Petition

81-1346

No.

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IN THE

Supreme Court of the United States

October Term, 1981

STANLEY JAFFEE and SHARON BLINN JAFFEE,
Plaintiffs-Petitioners,
and

STANLEY JAFFEE, on behalf of all others similarly situated,
Plaintiff,
against

UNITED STATES OF AMERICA,
Defendant,
and

ROBERT T. STEVENS, J. LAWTON COLLINS, JOSEPH M. SWING, WILLIAM C. BULLOCK, ROBERT A. LOVETT, HENRY D. SMYTH, T. KEITH GLENNAN, EUGENE M. ZUCKERT, MARION W. BOYER, KENNETH D. NICHOLS, KENNETH E. FIELDS, and Certain Additional Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity.
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. May the doctrine of absolute official immunity announced by the Circuit Court, which is in direct conflict with an earlier decision of this Court and a recent decision of another Circuit Court, be invoked where high Government officials, in peacetime, and without legitimate military purpose deliberately conducted involuntary human experimentation upon a serviceman under their control, thereby causing that serviceman to suffer serious and permanent injury?

2. Should the decision of the Circuit Court stripping both federal and state courts of jurisdiction to consider any common law intentional tort claims brought by servicemen or former servicemen against Government officials be permitted to stand especially where this issue was neither briefed nor argued in the courts below?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

No.

STANLEY JAFFEE and SHARON BLINN JAFFEE,
Plaintiffs-Petitioners,

and

STANLEY JAFFEE, on behalf of all others similarly situated,
Plaintiff,

against

UNITED STATES OF AMERICA,
Defendant,

and

ROBERT T. STEVENS, J. LAWTON COLLINS, JOSEPH M. SWING, WILLIAM C. BULLOCK, ROBERT A. LOVETT, HENRY D. SMYTH, T. KEITH GLENNAN, EUGENE M. ZUCKER, MARION W. BOYER, KENNETH D. NICHOLS, KENNETH E. FIELDS, and Certain Additional Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Petitioners Stanley Jaffee and Sharon Blinn Jaffee pray for a *writ of certiorari* to review a judgment of the United States Court of Appeals for The Third Circuit entered in these proceedings on November 2, 1981, which affirmed the dismissal of petitioners' claims for compensatory and punitive damages for serious and permanent personal injuries inflicted upon Mr. Jaffee while in military service, in peacetime, by high Government officials, acting without legitimate military purpose, and in flagrant violation of the Constitution and laws of the United States, the tort law of the various states, and the law of nations, all of which outlaw involuntary experimentation upon human subjects.

Opinions Below.

The opinion of the Court of Appeals *en banc*, reversing the holding of the panel of that Court appears at pages 1a to 85a of the attached appendix and is reported at ____ F.2d ____.

The opinion of the panel of the Court of Appeals appears at pages 1b to 28b of the attached appendix and is not officially reported.

The opinion of the District Court from which appeal was taken to the Circuit Court appears at pages 1c to 6c of the attached appendix and is reported at 468 F. Supp. 632.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved.

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. IX:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Statement of the Case.

Introduction.

This appeal presents an exceptionally important question of federal law: whether high Government officials are to be afforded absolute immunity where they willfully and intentionally violate the fundamental constitutional rights of a serviceman by subjecting him to involuntary human experimentation, thereby causing him severe and permanent injury.

The decision of the Circuit Court, concluding that neither state nor federal courts have power to review such claims, regardless of the nature of the wrong alleged, is in direct conflict with not only an earlier decision of this Court, *Dinsman v. Wilkes,* 53 U.S. (12 How.) 389 (1851), but also a recent decision of the Ninth Circuit, *Wallace v. Chappell,* ___ F.2d ___ (No. 79-3172, Nov. 2, 1981), both of which explicitly uphold the right of servicemen to bring damage actions against their military supervisors for intentional and constitutional wrongs.

Moreover, insofar as the decision of the Circuit Court purports to strip both state and federal courts of power to review state common law intentional tort claims by servicemen against their supervisors, this appeal was improperly decided. This is true because neither party ever briefed or argued in the District Court, before the Panel, or before the *en banc* Circuit Court, the propriety of these common law claims.

Briefly stated, this is an appeal from the dismissal of claims brought by a former serviceman who was seriously injured when he was compelled by defendants, in direct and flagrant violation of his constitutional rights, to attend and participate in the test explosion of a nuclear bomb at Camp Desert Rock, Nevada, in the spring or summer of 1953.

Defendants Stevens, Collins, Swing, Bullock, Lovett, Smyth, Glennan, Zuckert, Boyer, Nichols and Fields (hereinafter "the individual defendants") all were high military or civilian officials responsible for organizing this test. Each appeared by Justice Department counsel, and moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss all claims against them. In support of the motion, the individual defendants argued that they were absolutely immune from liability, notwithstanding the egregious nature of their conduct, and notwithstanding the serious injury suffered because, under authority of *Feres v. United States,* 340 U.S. 135 (1950), a serviceman is forever barred from suing any Government official for injuries sustained while on duty. The ten non-New Jersey defendants also argued (defendant Smyth is a resident of New Jersey and was served within the district) that the District Court lacked *in personam* jurisdiction and that the venue was improper.

The District Court, while rejecting defendants' jurisdictional and venue arguments in their entirety, dismissed the complaint on the strength of *Feres,* "with the gravest reluctance." In doing so, the Court explicitly acknowledged that it was "unjust" to dismiss the actions, but felt constrained to do so. This appeal was certified, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, so that there might be immediate appellate review of these dismissals.

On appeal, a panel of the Circuit Court unanimously reversed the District Court, concluding that it was error to hold "that there is a federal rule of absolute intra military immunity from suit" (A36).*

In an application for rehearing *en banc,* the Government conceded that this appeal "involves questions of exceptional importance" (Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc,* Statement Pursuant to Local Rule 22). Upon rehearing *en banc,* the judgment of the Panel was vacated and the judgment of the District Court was affirmed. In reversing its own Panel, the majority of the Circuit Court concluded, that there were no prior decisions of this Court factually and doctrinally comparable to the instant case (A4a); that the result it reached might be called "harsh" (A4a); that aspects of its holding were "troubling" (A19a); "not free from doubt" (A25a) and "difficult" (A27a). In a dissent, conceded by the majority to be "forceful and eloquent" (A27a), the Circuit Judge who authored the original panel opinion, deplored the majority's holding as "irresponsible" (A47a), and concluded that "when the majority announces an intra-military immunity so broad as to deprive every court in the land of jurisdiction to hear a claim for relief for the commission of a willful tort, it explores new territory and invents new doctrines, unwarranted by our historical experience" (A69a). The instant petition for a *writ of certiorari* follows.

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*Parenthetical references prefixed with "A" are to the Appendix attached and made part of this Petition. Those without prefix are to the Appendix filed with the Circuit Court, a copy of which has been certified by the Clerk of that Court to this Court.

Petitioners' factual contentions.

At some time during the spring or summer of 1953, a substantial number of American servicemen, including plaintiff Stanley Jaffee, were ordered by the respondents to attend and participate in the test explosion of a nuclear device at Camp Desert Rock in Nevada (3a, ¶¶ 7, 18). These servicemen were subject to military discipline, and the Government has conceded that they were compelled to attend the atomic blast and were not volunteers. They were never advised that participation in the test involved any possible health danger to them nor were they given any opportunity to decline or refuse to participate (9a).

At the test site itself, the soldiers were exposed to massive doses of dangerous radiation when the atomic bomb was exploded only two or three thousand yards away from where they were ordered to stand (3a). They were provided with no protective devices or clothing to shield them from the bomb's harmful radiation. Thereafter they were exposed to additional radiation when they were immediately ordered to leave their trenches and march toward the very site of the atomic explosion itself.

At the time of this test, the defendants were well aware of the great dangers inherent in exposing human beings to the radiation from a nuclear explosion (4a, ¶23). However, they consciously ignored this knowledge, and instead deliberately used these servicemen as unwilling and uninformed subjects of a highly dangerous experiment (5a, ¶24).

The individual defendants have never taken any steps to warn or advise these servicemen of the dangers to which they were exposed by being forced to participate in this testing (3a, ¶43). On the contrary, they dishonestly assured them that there were no dangers whatsoever from their exposure. Accordingly, these servicemen, including plaintiff herein, were unaware of any special need for medical attention.

Plaintiff, Stanley Jaffee, was an Army enlisted man who was compelled to attend the blast (3a, ¶17). He is forty-seven years old, married with three minor children, and has lived and worked his entire life in the State of New Jersey. He was drafted in 1952, served a two year tour of active duty, and he was honorably discharged from service.

In November, 1977, Jaffee discovered that he had developed breast cancer as a result of his exposure to the nuclear radiation from the explosion (5a). Although a radical mastectomy was performed, subsequent medical tests have revealed that his cancer has spread and is inoperable (5a). He is presently undergoing a course of chemotherapy (5a).

Original Basis of Federal Jurisdiction.

Federal jurisdiction over the instant action exists pursuant to 28 U.S.C. §1331(a) in that this action arises under the First, Fourth, Fifth, Eighth and Ninth Amendments to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT.

POINT I.

The holding of the Circuit Court, which purports to strip all state and federal courts of power to review intentional constitutional violations of high Government officials, presents an exceptionally important question of federal law which should be reviewed and settled by this Court.

The instant action has generated seven separate opinions in the Circuit (plus one in the District Court). It has witnessed reversals of positions and unusually forceful dissents. And it has been universally recognized by every jurist who has passed upon it as posing a question of federal law that is of exceptional public importance. Moreover, the Government in applying for rehearing and in its suggestion for rehearing *en banc* pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure, certified pursuant to Local Rule 22 of the Third Circuit, the belief "that this appeal involves questions of exceptional importance * * *."*

The issues which were identified by the Government as being of "exceptional importance" were characterized by it as follows: " * * whether the *Feres* doctrine provides an absolute intra-military immunity from tort suits; whether a claim of causing intentional bodily harm to servicemen warrants a recognition of an action under the Constitution for damages; and whether venue and *in personam* jurisdiction lie in Federal District Court in New Jersey, where 10 of the 11 individual defendants reside outside of New Jersey, and the claimed constitutional wrong took place in Nevada." It is precisely these issues, or certainly the first two of them, albeit phrased somewhat differently, which petitioners now urge upon this Court as an exceptionally "important question of federal law" pursuant to Rule 19(1) (b) of the Rules of this Court.

Simply stated, the doctrine of absolute intra-military immunity effectively established by the Third Circuit opinion, is so extremely important a question of federal law that it virtually demands consideration by this Court.

The position taken by the majority of the Circuit Court is that the question of absolute intra-military immunity at issue here has never been directly considered or decided by this Court. Indeed the Circuit Court, in the face of violent criticism both in dissenting and concurring opinions, sought to justify its holding upon a prediction of what this Court might do with this case (A4a). Certainly if the majority is correct that the basic issues it confronted were undecided by this Court, then given the unquestioned importance of these issues, and the fact that the majority and concurring opinions repeatedly characterized its conclusions as "harsh" (A4a), "troubling" (A19a), "not free from doubt" (A25a), and "difficult" (A27a), it follows that the majority both expects and even desires this Court to review this appeal.

Moreover, given the nature of this case, it can hardly be otherwise. For no matter how the majority seeks to cast its opinion, its holding announces a broad doctrine of law which declares that any high Government official may perpetrate the most outrageous and unspeakable of intentional harm on servicemen, secure in the knowledge that he would never have to answer or be held accountable to those injured. The District Judge who first grappled with this, and, indeed, Government counsel who appeared before him both faced up to this in the following remarkable interchange:

> "The Court: (A)s I read the law, it doesn't matter if they stood up there and said, 'one, two, three, left, right, left,' and marched them over a cliff * * * You'd be protected under *Feres* * * *?
>
> "Mr. Landman: Yes, your Honor" (A6c).

What the District Judge stated bluntly, and obviously believed to be unjust, the majority of the Circuit Court effectively has endorsed by circumlocution. Now, this Court must consider and decide whether the principle of official unaccountability announced below will be permitted to remain as precedent. The issue presented is too important not to be resolved by this Court.

POINT II.

The doctrine of absolute intra-military immunity announced by the Circuit Court is in direct conflict with an earlier decision of this Court.

The majority of the Circuit Court is in serious error when it claimed it could find no decision of this Court which considered and decided the basic intra-military immunity question at issue here. In fact, this Court did decide in *Dinsman v. Wilkes*, 53 U.S. (12 How.) 389 (1851), that a serviceman might bring an action against a military superior for an intentional tort, precisely what the Jaffees seek to do here.

It is astonishing that the Circuit Judge who wrote for the majority should assert that this is a novel, undecided issue, when that very same Judge in his earlier concurring panel opinion felt constrained to rule for plaintiffs explicitly because he felt bound by the decision of this Court in *Dinsman v. Wilkes* (A28b). It is also extremely telling that the *en banc* majority opinion does not even mention *Dinsman v. Wilkes*, and that the author of the majority opinion makes no attempt to explain why he suddenly no longer considered *Dinsman* controlling authority. The explanation for this silence, of course, is that no one could marshal any rational explanation for this switch. Judge Adams recognized this in his concurring and dissenting opinion, where he stated,

> Whatever the merits of *Dinsman*, decided more than a century ago, it remains the law, and indeed has been cited several times in the recent past by the Supreme Court. E.g. *Butz v. Economou*, 438 U.S. 478, 492-94 (1978). If it is to be overruled, the Supreme Court should do it. An intermediate appellate court obviously does not possess such authority (A41a, n. 8).

In short, the opinion and holding of the majority of the *en banc* Circuit Court is in direct conflict with a decision of this Court which explicitly permits servicemen to bring intentional tort actions against their superiors.

The *Dinsman* decision, as Judge Adams recognized, has been repeatedly cited with approval and relied upon by this Court. The instant Petition should be granted to correct the failure of the Circuit Court to follow the binding authority of this Court's earlier decision.

POINT III.

The decision of the Circuit Court creates a direct conflict of major importance among the circuits.

Even if *Dinsman v. Wilkes* was not controlling precedent which the Third Circuit ignored, there also exists recent circuit court authority that is in direct and absolute conflict with the instant decision of the Third Circuit. On the very same day that this case was decided, the Ninth Circuit held in *Wallace v. Chappell*, ____ F.2d ____ (9th Cir., No. 79-2173, Nov. 2, 1981), that servicemen may sue their superior officers for money damages for intentionally inflicted constitutional wrongs.

In *Wallace,* an action brought by several black sailors alleging racial discrimination, the Ninth Circuit, unlike the Court below here, refused to accept the Government's argument that the requirements of maintaining military discipline demanded a doctrine of absolute judicial non-reviewability of military behavior. Instead, that Circuit opted for restrained standards of review where intentional violations of recognized constitutional rights occur —standards articulated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

Even more significantly, in addressing the question of intra-military immunity so central to the decision below here, the Ninth Circuit explicitly rejected the Government's absolute immunity arguments based upon *Feres v. United States*, 340 U.S. 135 (1950), and concluded that,

> "To adopt a *per se* rule of either non-reviewability or absolute immunity as to all injuries arising out of military service would open the door to a range of unredressable wrongs bounded only by the limits of one's imagination."

In short, it is clear that the Ninth Circuit would, on authority of *Wallace v. Chappell*, decide this case differently from the Court below. A conflict between the Circuits thus exists, and should be reviewed and resolved by this Court.

POINT IV.

The Circuit Court's precipitous decision, without benefit of brief or argument, to strip state and federal courts of jurisdiction to review common law intentional tort claims by servicemen against Government officials should be reviewed.

Yet another reason why this petition should be granted is identified in both Judge Adams' and Judge Gibbons' separate dissents, in which they correctly state that both in the District Court, as well as in the Circuit, no party either briefed or argued, nor were they asked to brief or argue, the propriety of the pendent state law intentional tort claims asserted (A79a). While Judge Adams proposed a remand to the District Court to consider this question (A43a), and Judge Gibbons concluded that the majority's disposition of the state law claims was irresponsible and in error (A47a), it is clear that the four Circuit Judges who endorsed one or the other of these two opinions felt that the majority had overstepped its bounds in basing much of its holding upon an unbriefed and unargued issue. In this regard, it is respectfully suggested that the majority opinion of the Circuit Court is a sufficient departure from the normal course of appellate proceedings as to justify this Court's exercise of its powers of supervision by granting this writ. See Rule 19(1) (b) of the Rules of this Court. This is particularly true where, as here, a lower court has taken the extraordinary step, on its own authority, of eliminating well established common law remedies.

The exremely harsh and far-reaching consequences of the majority's *sua sponte* action were well described by Judge Gibbons:

> "The opinion of the court certainly achieves uniformity by providing that all courthouse doors are shut for all intentional torts. No civil court may redress unlawful searches and seizures, false imprisonments, or beatings. If a military command tolerates the presence of a Ku Klux Klan Klavern on a post and its members assault blacks or steal their property, the victims are deprived of access to a civil tribunal, which might expose a military cover-up. If female service personnel are raped while on duty, they are deprived of the right to insist that the aggressors respond in damages. If a commanding officer places a sadist in charge of the brig, his victims will be dependent for redress solely upon the chain of command which placed the sadist in charge. That kind of uniformity is purchased at too high a price in any society which treasures human rights."

POINT V.

The instant case is a proper vehicle for review by this Court since it presents a well defined legal issue which should be settled to provide guidance to the lower federal courts.

The simple procedural history of this appeal, arising as it does out of the District Court's initial Order dismissing the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, guarantees an uncomplicated and straightforward record on appeal. This coupled with the stark intra-military immunity issue presented here, as well as the extensive consideration and analysis provided in the seven opinions already written below, all make this case a proper vehicle for review by this Court.

Moreover, it is extremely important at this time that this Court grant certiorari in the instant case to provide guidance to the lower federal courts concerning the balance, if any, which must be struck between concerns for the maintenance of military discipline expressed in *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, and the recent line of decisions by this Court which have, without exception, upheld the right of individuals to seek relief in federal courts directly under the Constitution for the intentional misconduct of high Government officials, even in military contexts, *see*, *Scheuer v. Rhodes*, 416 U.S. 232 (1974); see also, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *Butz v. Economou*, 438 U.S. 478 (1978).

The instant case is but the first of a number of actions now working their way through the federal courts, arising out of the Government's atmospheric nuclear testing program and posing similar issues concerning the balance between the maintenance of military discipline and the right to seek relief for alleged constitutional and intentional wrongs. See e.g., *Broudy v. United States*, ____ F.2d ____ (No. 79-3829 9th Cir. Nov. 9, 1981) [allowing the widow of a nuclear blast cancer victim a cause of action for failure to warn of radiation dangers post discharge, but not for the actual wrongful exposure to radiation incident to service]; *Monaco v. United States*, ____ F.2d ____ (No. 79-4787 9th Cir., Nov. 9, 1981) [reluctantly denying family of an irradiated serviceman a cause of action for personal injuries directly suffered by non-military family members as a consequence of the genetic disruption caused by the radiation]; *Hinkie v. United States*, ____ F. Supp. ____ (No. 79-2340 E.D. Pa., October 19, 1981) [allowing family members of irradiated servicemen suffering genetic injuries the cause of action denied in *Monaco, supra*]. The foregoing cases, to say nothing of the panel opinions and the *en banc* opinions of the Circuit Court herein, all evidence a great deal of uncertainty at the trial and intermediate appellate levels in grappling with the important issues presented. It is respectfully suggested that the time has come for this Court to resolve these uncertainties and conflicts as to these significant federal issues.

In the final analysis though, this Court should review and reverse the Circuit Court's holding that American servicemen are powerless to seek judicial relief even when they are victims of the most massive of intentional human rights violations, because that decision is, and, if undisturbed, will remain an affront to American jurisprudence. Judge Gibbons, a learned, experienced, and responsible jurist was directly on target when he wrote in his dissent that:

> "The present opinion of the court, authored by a judge who joined in the panel judgment reversing the dismissal of the claims against individual defendants, purports not to decide the appeal on immunity grounds. Instead, without briefing from either party in the district court of here, the court irresponsibly affirms the dismissal on what it claims is a different theory: that under federal or under state law a charge by a serviceman that he was subjected to the intentional tort of involuntary human experimentation, without legal authority and without military justification, fails to state a claim upon which relief can be granted in any court.
>
> The Twentieth Century has witnessed time and again, in this country and elsewhere, the fragility of those protections which the legal order affords against human rights violations. One of those fragile protections is the admonitory law of intentional torts, designed to require public accountability for individual conduct, official or

private, going beyond the bounds of social acceptability. Certainly the conduct charged in the complaint, if proved, transgressed those bounds. Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. The international concensus against involuntary human experimentation is clear. *A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt. That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government. That this court, which once had a deserved reputation for sensitivity to human rights issues, should undertake to do so is a saddening demonstration of the extent to which it has lost the spirit which once animated our deliberations" (47a-48a, footnotes omitted).

CONCLUSION.

For the reasons stated, and especially for the reasons set forth at length in Judge Gibbons' dissent, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX.

Opinion of the Court of Appeals *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1543

STANLEY JAFFEE and SHARON BLYNN JAFFEE, INDIVIDUALLY,
Appellants

and

STANLEY JAFFEE, on behalf of all others similarly situated,

v.

UNITED STATES OF AMERICA, ROBERT T. STEVENS, J. LAWTON COLLINS, JOSEPH M. SWING, WILLIAM C. BULLOCK, ROBERT A. LOVETT, HENRY D. SMYTH, T. KEITH GLENNAN, EUGENE M. ZUCKERT, MARION W. BOYER, KENNETH D. NICHOLS, KENNETH E. FIELDS, and Certain Additional Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. CIV. NO. 78-1014)

Argued November 15, 1979

Before: GIBBONS, HIGGINBOTHAM
and SLOVITER, *Circuit Judges*

Reargued November 17, 1980

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS,
GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion Filed November 2, 1981)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

When a soldier is injured as a result of his military service, the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, provides compensation for medical care and a limited income, regardless of whether the government is at fault. In *Feres v. United States,* 340 U.S. 135 (1950), and most recently in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977), the Supreme Court has held that soldiers "injured in the course of activity incident to service" may not sue for additional compensation from the government under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 (Tort Claims Act). These decisions were based primarily on the availability of assured compensation under the Veterans' Benefits Act and of the effect of law suits on military effectiveness. Our court and other courts have subsequently applied the doctrine of service immunity enunciated in *Feres* to protect the government from suits brought directly under the Constitution, even when the suits alleged intentional violations by governmental officials.[1] We have also interpreted the doctrine to immunize government officials sued in their individual capacity from liability to military personnel for negligent torts.[2]

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[1] *See* Calhoun v. United States, 475 F.Supp. 1 (S.D.Ca.1977), *aff'd and D.C. Opinion adopted,* 604 F.2d 647 (9th Cir. 1979), *cert. denied,* 444 U.S. 1078 (1980); Jaffee v. United States, 592 F.2d 712 (3d Cir.), *cert. denied,* 441 U.S. 961 (1979) (prior appeal of this case); Everett v. United States, 492 F.Supp. 318 (S.D.Ohio 1980); Schnurman v. United States, 490 F.Supp. 429 (E.D.Va. 1980); Nagy v. United States, 471 F.Supp. 383 (D.D.C. 1979); Misko v. United States, 453 F.Supp. 513 (D.D.C. 1978); Rotko v. Abrams, 338 F.Supp. 46 (D.Conn. 1971), *aff'd,* 455 F.2d 992 (2d Cir. 1972) (per curiam).

[2] *See* Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir.), *cert. denied,* 389 U.S. 923 (1967). *See also* Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971).

In this case we are asked to consider whether the principles which led to the development of military immunity counsel against the finding of a new cause of action directly under the Constitition against *individual* government defendants for *intentional* and *unconstitutional* torts occurring incident to military service. Because the prior decisions of the Supreme Court and this court have held that plaintiffs' remedy of veterans' compensation is exclusive and that a cause of action for additional compensation would undermine military effectiveness, we hold that plaintiffs do not have a cause of action directly under the Constitution against the defendants in these circumstances. We recognize that the prior Supreme Court cases on which we rely can be factually and doctrinally distinguished. But those cases are barometers which suggest how the Court would decide this case. Just as no barometer is a precise predictor of tomorrow's weather, no prior case, which can be factually or doctrinally distinguished, is a perfect predictor of how the Court will decide a related but different case. Nevertheless, we cannot avoid our obligation to forecast or predict how the Court will decide troubling cases involving new factual situations. In view of the hard policy choices already made by the Supreme Court in a series of related but different cases, it seems clear that a majority of the justices would hold that the plaintiffs have no cause of action.

We are also aware of what some might call a harsh result in our holding. We are not suggesting that individuals in plaintiffs' position should never receive any additional compensation from either the federal government or from private defendants which would supplement their present rights under the Veterans' Benefits Act. Any decision on whether claims of the plaintiffs should be converted to a cause of action, however, should be reserved for Congress to make in these special circumstances. It is that body which must weigh the competing priorities and policy judgments to determine whether a cause of action should be created. Therefore, we will affirm the district court's dismissal of those of plaintiffs' claims brought directly under the Constitution.[3] For similar reasons, we will also affirm the dismissal of plaintiffs' pendant claims founded directly on state law.

I.

FACTS

According to the appellants' complaint, whose allegations we must accept as true for purposes of the appeal, Stanley Jaffee was serving on active duty in the United States Army in 1953. In the spring or summer of that year, he and other active soldiers at Camp Desert Rock in the State of Nevada were ordered by their commanding officers to stand in a field without benefit of any protection against radiation while a nuclear device was exploded a short distance away. Even though the defendants allegedly knew they were exposing Jaffee and the other soldiers to grave risk of injury and death, they "knowingly, deliberately and recklessly disregarded this knowledge by compelling Jaffee and the other soldiers to participate in the test." Complaint of Appellants at 5, *reprinted in* App. at 5a. As a result of this exposure to radiation, Jaffee developed inoperable cancer in November of 1977.

Jaffee and his wife brought suit against the United States government and various named and unnamed army and civilian Defense Department employees for violation of his constitutional rights as guaranteed by the first, fourth, fifth, eighth and ninth amendments, and of unspecified state tort laws. In Counts One, Two and Three Jaffee asked for compensatory and punitive damages of 13 million dollars from the United States government and the individual defendants. In Count IV, a class action brought in favor of all those soldiers present at the site, Jaffee prayed that the United States be directed to warn all members of the class about the medical risks facing them. He also prayed that the United States be required to provide or subsidize medical care for the members of the class who had been injured or would sustain injuries as a result of that exposure. The district court initially dismissed Count IV on the grounds that the United States was immune from liability under the doctrine of sovereign immunity, and that the United States, pursuant to *Feres v. United States*, had not waived that immunity under the Federal Tort Claims Act.

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[3] Numerous courts have dismissed similar claims. *See* Calhoun v. United States, 475 F.Supp. 1; Sigler v. LeVan, 485 F.Supp. 185 (D.Md. 1980); Schmid v. Rumsfeld, 481 F.Supp. 19 (N.D.Cal. 1979); Nagy v. United States, 471 F.Supp. 383; Thornwell v. United States, 471 F.Supp. 344 (D.D.C. 1979); Misco v. United States, 453 F.Supp. 513.

In an interlocutory appeal from the dismissal of Count IV, this court affirmed the district court's decision as to damages, but reversed the dismissal as to injunctive relief. *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979) (*Jaffee I*). The federal government was held to be absolutely immune from damages because of the doctrine of sovereign immunity. Although we recognized that "the current climate of academic and judicial thought finds governmental immunity from suit in disfavor," we observed, on the basis of *Feres*, that the rationale for service immunity was different:

> If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public

> criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States." *Jefferson v. United States*, 178 F.2d 519, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

Id. at 717. As to the claim for injunctive relief, however, the court held that there had been a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. §§501 *et seq.*, because review was sought of an agency's inaction. Accordingly, the government was directed to warn the members of the class about any potential health hazards.

The district court subsequently dismissed the claims brought under Counts One, Two and Three on the ground that the rationale behind the doctrine of governmental immunity announced in *Feres v. United States* also applied to claims brought against individual defendants for intentional torts. Noting that every court which had reached this issue had held the defendants immune, it concluded, "To the extent that *Feres* is predicated upon the need for maintaining military discipline and avoiding judicial review of military orders, that consideration apparently applies with equal force to the negligence, intentional torts and unconstitutional actions of military officers." *Jaffee v. United States*, 468 F.Supp. 632, 634-35 (D.N.J. 1979).

The plaintiffs have appealed the dismissal on the ground that the immunity announced in *Feres* does not apply to actions brought against individuals who cannot claim sovereign immunity. They argue that this is especially true when the defendants are alleged to have committed intentional torts and the cause of action is implied directly under the Constitution. The government, on the other hand, contends that Jaffee possesses no cause of action under the Constitution. In the alternative, it argues that federal officials are immune from liability in the circumstances of this case. A prior panel of this court filed an opinion on February 20, 1980, but that decision was later vacated and the case heard before the court in banc.

II.

A DIRECT CAUSE OF ACTION UNDER THE CONSTITUTION

The Supreme Court has not directly considered the question of whether a cause of action exists against government officials for willful unconstitutional torts occurring incident to military service. In this case, we will first examine the standard developed by the Court for finding a cause of action under the Constitution. In light of this standard, we will investigate the various decisions reached by the Supreme Court and this court regarding liability of the government against suits for service injuries under the Tort Claims Act. Then, we will attempt to predict how the Court would apply the reasoning behind that military immunity doctrine to the question of whether a cause of action can be implied under the Constitution for Jaffee's claims against individual government officials. Finally, we will consider whether the state law claims may continue in the face of the federal statutory program. Because of our disposition of these issues, we need not address the grounds adopted by the district court that the defendants are immune from suit.

The Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), "established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). The Court warned in *Bivens*, however, that a private right of action for constitutional violations might not be implied when there was an "explicit congressional declaration" that plaintiffs should be "remitted to another remedy, equally effective in the view of Congress"; or when there were "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396, 397. In these latter two circumstances, the Court would defer to a congressional judgment on whether or not to grant a cause of action.

Delineation of the type of factors which would lead the Court to refrain from implying a cause of action under the Constitution was provided in two recent cases: *Davis v. Passman,* 442 U.S. 228 (1979), which found a direct cause of action against a congressman for sex discrimination; and *Carlson v. Green*, which held federal prison officials amenable to suit directly under the eighth amendment.

The first factor, as the Court had suggested in *Bivens*, is when "Congress has provided an alternative remedy which it explicity declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 18-19 (emphasis in original). It is not necessary to show that Congress "recited any specific 'magic words,' " but only that Congress has "indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy." *Carlson*, 446 U.S. at 19, n.5 (Majority Opinion), *quoting* Dissenting Opinion of Burger, C.J., *id* at 31 n.2. In each case, the Court looked to the language and legislative history of the Federal Tort Claims Act to discern whether Congress "meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19 (footnote omitted). In *Carlson* the Court found an explicit declaration that the Tort Claims Act was not meant to preclude the cause of action raised in that case. In *Davis* the Court found that legislative silence on the question did not constitute the requisite "explicit declaration." It also noted that there were no "other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.' " *Davis*, 442 U.S. at 245, *quoting Bivens*, 403 U.S. at 410 (Harlan, J. concurring). "[W]ere Congress to create equally effective alternative remedies," it allowed, "the need for damages relief might be obviated." 442 U.S. at 248.

The second consideration which would lead the Court to refrain from finding a new cause of action under the Constitution are "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. Although neither decision examined what type of consideration would satisfy this standard, the Court in *Davis* recognized that "a suit against a Congressman for putatively unconstititional actions taken in the course of his official conduct does raise special concerns counseling hesitation."[4] This reference suggests that the type of policy analysis that led to the establishment of an immunity might be examined in identifying "special factors." Of course, these factors could not be limited to constitutional or common law immunities. Because the immunity independently precludes the suit even if the cause of action is implied, such a limitation would make the second prong redundant. The reference by the Court to immunity merely suggests that it might look to such considerations when deciding whether to imply a cause of action.

III.

GOVERNMENT IMMUNITY FOR INJURIES ARISING DURING MILITARY SERVICE

The Supreme Court has examined the general question of immunity for service-related torts in a series of cases interpreting the liability of the federal *government* under the Tort Claims Act. While these decisions only considered whether Congress had waived sovereign immunity for the federal government under the Act, the rationale adopted by the Court strongly bears on whether a cause of action would be implied under the standard outlined in *Bivens* and its progeny.

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[4] However, the Court found "these concerns . . . coextensive with the protections afforded by the Speech or Debate Clause." 442 U.S. at 246 (footnote omitted). Thus, when this clause does *not* apply, " 'legislators ought . . . generally to be bound by [the law] as are ordinary persons.' " *Id.*, *citing* Gravel v. United States, 408 U.S. 606, 615 (1972).

The Tort Claims Act waives sovereign immunity in broad language. Under its terms the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. §2674.[5] Nevertheless, in *Feres v. United States*, the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. In reaching this conclusion, the Court conceded that there were "few guiding materials for our task of statutory construction," *id.* at 138, but found that Congress could not have intended that the government be liable for service injuries because of various policy reasons.

The primary rationale was not advanced in *Feres* itself but in two subsequent decisions, *United States v. Brown*, 348 U.S. 110 (1954) and *United States v. Muniz*, 374 U.S. 150 (1963). According to these decisions, the immunity of the federal government from suit was "best explained" by

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for . . . negligent acts committed in the course of military duty. . . .

Brown, 348 U.S. at 112. *Accord, Stencel Aero Engineering v. United States*, 431 U.S. at 671-72. Under this reasoning, suits for service injuries appear to have two consequences. The first is their effect on the willingness of military personnel to follow directions of their superiors.

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[5] Congress qualified this general waiver of immunity in circumstances not pertinent to the present case, such as transmission of postal material, assessment of taxes, imposition of guarantor, or operation of the Panama Canal.

The Court in *Stencel*, a subsequent case based on *Feres*, observed that "the relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals." 431 U.S. at 670. Scrutinizing military decisions in civilian courts would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.* at 673. As we noted in *Jaffee I*:

> If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States."

592 F.2d at 717, quoting *Jefferson v. United States*, 178 F.2d 519, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States*, 340 U.S. 135 (1950).

Suits for service injuries would also appear to have a related effect on the decisionmaking of military authorities who give orders. Military decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently be called into a civilian court to answer for their actions. While the Tort Claims Act would not make them personally liable in these circumstances, the prospect of adversarial civilian scrutiny might inhibit the exercise of military discretion.

The second rationale advanced for the service immunity originally established in *Feres* is the existence of a no fault compensation scheme pursuant to the Veterans' Benefits Act. *See Feres v. United States*, 340 U.S. at 144-45; *Stencel Aero Engineering Corp.*, 431 U.S. at 671. Under this program, a soldier is assured of a swift, "simple, certain, and uniform compensation" for injuries occurring during his service, regardless of fault. *Feres*, 340 U.S. at 144. This scheme currently provides for all of his medical care, limited income for him if he is disabled after discharge, and limited income for his family if he should die as a result of his injury.[6] According to *Feres* and its progeny, Congress could not have intended a dual system of liability under the Veterans' Benefits Act and the Tort Claims Act.[7]

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[6] According to figures received from the Veteran's Administration, a veteran with a 100% disability rating for an injury resulting from his service currently receives a minimum of $1,130 per month tax free. If he is married his monthly payment increases, as it does with each additional child. In addition to this basic payment, there are special supplementary payments for loss of use of a limb, an eye, or other serious military injuries. The pertinent Veterans' Benefits provision may be found as follows:

38 U.S.C. §§301-362: compensation for service connected disability or death.

38 U.S. C. §§401-423: dependency and indemnity compensation for service connected deaths.

38 U.S.C. §§501-562: pensions for non-service connected disability or death.

38 U.S.C. §§601-654: hospital, domiciliary, and medical care.

38 U.S.C. §§701- 788: life insurance.

[7] In *Feres*, the Supreme Court recognized a third rationale for the immunity. The "distinctly federal" relationship between the government and members of its armed forces counseled against intervention under divergent state law causes of action. 340 U.S. at 143. According to the Court's subsequent decision in *Stencel Aero Engineering Corp.*, which was based on *Feres*, "it would make little sense to have the Government's liability to members of the armed services depend on the fortuity of where the soldier happened to be stationed at the time of injury." 431 U.S. at 671. It is doubtful that this rationale serves to do anything but reinforce the other two, for as Justice Marshall pointed out, a similar argument could be made with regard to the "Bureau of the Census, the Immigration and Naturalization Service, and many other agencies of the Federal Government." *Id.* at 675 (Marshall, J., dissenting).

In construing the scope of military immunity, the Supreme Court has adhered to "the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty," *United States v. Brown*, 348 U.S. at 113. This is the line where military authority and, for the most part, the existence of a compensation system for military personnel is invoked. Thus, in *Feres* the Court held that the United States government was not liable under the Tort Claims Act for the death of an officer in a fire which resulted from a defective heating system in his barracks. Because the officer was serving on active duty when the fire occurred, the government was not liable for its negligent decision to quarter him in the barracks. In two companion cases, *Jefferson v. United States and United States v. Griggs*, the Court found the government immune from liability to army soldiers injured during active duty as a result of negligent medical operations performed by army doctors. Similarly, in *Stencel Aero Engineering Corp.*, it found the government immune from liability to a third party defendant and a military pilot permanently injured as a result of an allegedly defective fighter plane ejection system built by the third party defendant. The Court explained that outcome in a subsequent decision as follows:

> Recognizing that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service connected injuries, we declined [in *Stencel*] to construe the Tort Claims Act to permit third-party indemnity suits that in effect would expose the Government to greater liability than that contemplated under the statutory compensation scheme. In *Stencel*, Congress had provided a remedy which we thought to be exclusive.

Hatzlachh Supply Co. Inc. v. United States, 100 S.Ct. 647, 650 (1980).

In *United States v. Brown*, on the other hand, it was held that the immunity did *not* apply to injuries sustained by a *former* serviceman in a Veteran's hospital as a result of medical malpractice committed by an army surgeon. *Feres* was distinguishable because "[t]he injury for which suit was brought [in *Brown*] was not incurred while [the plaintiff] was on active duty or subject to military discipline." 348 U.S. at 112. Therefore, the situation in *Brown* fell on the other side of the "line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." *Id.* at 113. *See also Brooks v. United States*, 337 U.S. 49 (1949) (soldier who suffered injury not incident to service by military personnel could sue for damages under the Act).

IV.

THE FERES DOCTRINE AND SUITS AGAINST INDIVIDUAL GOVERNMENT OFFICIALS FOR INTENTIONAL TORTS

While *Feres* and its progeny only considered government liability under the Tort Claims Act for negligent torts, the policy concerns expressed by the Court seem equally applicable to a case such as this where government officials are sued in their individual capacity for intentional torts.

The first distinction between this case and *Feres* — the fact that here suit was brought against government officials rather than against the government — provides a *stronger* argument for not allowing suit than in *Feres*. Suits against individuals have a far greater potential for chilling responsible decision-making than those against the government. In suits against individuals, the person who makes the decision is held accountable in damages. This fact provides one of the principal justifications for some form of immunity for individual government officials. As the Court stated in *Butz v. Economou*, 438 U.S.

478 (1978), immunity for government officials is based on two mutually dependent rationales:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 497, *quoting Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). On the other hand, in suits against the government, the public fisc rather than the individual decision-maker must bear the cost of the liability. *See Owen v. City of Independence*, 100 S.Ct. 1398, 1417 (1980).[8] In this respect, this case provides a more persuasive argument for not finding the defendants liable than *Jaffee I*, where we found the government absolutely immune.

Indeed, this court in *Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967), found that the justifications for the immunity announced in *Feres* applied to suits brought against government officials in their individual capacity. In *Bailey*, a serviceman sued an army surgeon for injuries occurring from allegedly negligent medical care performed in an army hospital while the serviceman was on active duty. In denying plaintiff relief, we held that suits brought for injuries occurring during military service had the potential for undermining the maintenance of army discipline, whether the suit was brought against the government or an individual. 375 F.2d at 74. *See also Calhoun v. United States*, 475 F.Supp. at 4 (circuit court opinion). In both cases the propriety of government actions would be reviewed by a civilian court and the injured parties had an alternative compensation scheme. Other courts have found individuals immune from tort liability for injuries occurring incident to military service. *See, e.g., Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Tirrill v. McNamara*, 451 F.2d 579 (9th Cir. 1971); *United States v. Lee*, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969).

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[8] In *Owen*, the Supreme Court relied in part on the difference in justification for governmental and individual immunity when it abolished immunity of municipalities from constitutional claims. It reasoned that "[t]he concerns that justified [qualified immunity for individual government officials] are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." 100 S.Ct. at 1416 (footnote omitted). In the first case, liability "could have an undue chilling effect on the exercise of [officials'] decisionmaking responsibilities", while in the second, "no such pernicious consequences were likely to flow from the possibility [of liability] from public funds." *Id.* at 1417 n.37.

The second distinction between this case and *Feres* is that the instant suit is for intentional torts allegedly committed in violation of the Constitution, rather than for negligent torts. Numerous courts which have considered this distinction, however, including this court in *Jaffee I*, have found the rationale of *Feres* applicable to intentional torts as well. The *Feres* decision discussed immunity for injuries arising "incident to service," and no compelling distinction can be made under that rationale for the *type* of injuries that occur during that service. Litigation over intentional torts would appear to disrupt military discipline and undermine military decision-making as much as tort suits for negligence. *See Citizens Nat'l Bank of Waukegan v. United States*, 594 F.2d at 1154. Indeed, the type of military exercise that gives rise to a claim of intentional torts, as in this case, is often more dependent on the exercise of discretionary military judgments than the adequacy of housing or medical care that was involved in *Feres*.

The question of whether a negligent act is taken intentionally, moreover, frequently turns on subtle issues of fact and intent that are difficult to fathom in the context of military exercises. If the dividing line for immunity becomes contingent on whether the act was negligent or intentional, virtually every case for negligence could now be brought successfully through "scholastic exercises in pleading" with the mere insertion of the words "intentional negligence." *Schmid v. Rumsfeld*, 481 F.Supp. at 21. Since the "fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial," *Imbler v. Pachtman*, 424 U.S. at 419 n. 13, these suits would not be dismissed. An absolute immunity defeats such "a suit at the outset, so long as the official's actions were within the scope of the immunity." *Id.* It thereby prevents the "second-guessing [of] military orders" and testimony by members of the armed forces "in court as to each other's decisions and actions" that *Feres* was intended to avoid. *Stencel*, 431 U.S. at 673. Thus, "[a]bsent the deprivation of a *recognized* constitutional right, it would subvert the application of the Federal Tort Claims Act and its defined exceptions to allow a litigant to superimpose over that body of law extensions of constitutional rights which were never intended to apply in this context." *Calhoun v. United States*, 475 F.Supp. at 5 (emphasis in original). Numerous courts have found the government immune from liability for intentional unconstitutional torts committed by its officials. *See, e.g., Calhoun v. United States*, 475 F.Supp. 1; *Jaffee v. United States*, 592 F.2d 712; *Misko v. United States*, 453 F.Supp. 513.

In summary, although the Supreme Court and this court have not explicitly considered this issue, the reasoning of our prior decisions reveals various policy reasons for hesitating to hold individual government officials liable for damage for *intentional* and *unconstitutional* torts in these circumstances.[9]

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[9] *See* cases cited at note 3.

V.

THE ABSENCE OF A DIRECT CAUSE OF ACTION UNDER THE CONSTITUTION

It remains to be examined whether these concerns suggest that a new cause of action should not be implied directly under the Constitution. As we stated above, the Supreme Court has identified two considerations — the presence of an alternative remedy and "special factors" present even in the absence of that alternative remedy.

From our reading of the above cases, it seems clear that the Court would find that suits based on service injuries involve, as a general matter, "special factors counseling hesitation." The Court has repeatedly identified the deleterious effects of service related suits on military performance. As recently as three years ago, it noted that the relationship between the government and "members of its Armed Forces is unlike any relationship of any private individuals." *Stencel,* 431 U.S. at 670. *In United States v. Muniz,* 374 U.S. at 162, it distinguished the effect of service related suits on military performance from the effect of suits brought by prisoners on the functioning of prisons. *Muniz* allowed prisoners to sue the government under the Tort Claims Act for injuries, even though comparable injuries to soldiers were not actionable under *Feres*. The relevance of *Feres* to the finding of a new cause of action is especially clear, moreover, where suit is brought for intentional torts committed on the battlefield during wartime. In these circumstances there appears to be no serious disagreement that the principles announced in *Feres* would preclude suit from being brought under the Constitution.

The application of these general principles to the case of intentional torts *not* commited on the battlefield presents a more troubling and closer question. Nevertheless, we do not find this fact determinative for two reasons.

First, as we have suggested, no compelling distinction can be made on these grounds under the rationale adopted in *Feres*. If the distinction between battlefield and non-battlefield decisions prevailed, soldiers could easily bring suits against their commanders for injuries occurring during basic training or maneuvers during wartime on the ground that their superiors' recklessness placed them in danger. *See e.g., Calhoun v. United States*. Such suits against the individuals who made the challenged decision, as in this case, would, under the reasoning of *Feres*, undermine the commanders' decision-making as much as, if not more than, suits against the United States, which this court dismissed in *Jaffee I*. Permitting suits for intentional torts in these circumstances would likely undermine military discipline at least as much as the allegedly negligent medical decisions and building decisions held immune in *Feres*, and the airplane construction decision protected in *Stencel*. Not only were these latter actions not taken on the battlefield, but unlike the present case, they were not taken pursuant to any military exercise or maneuvers. Nevertheless, they were protected in part because of the effect of suits on military discipline.[10] In short, the underlying rationale of *Feres* would appear to establish a bright line rule that would not admit of an exception in this case.

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[10] In Peluso v. United States, 474 F.2d 605, 606 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973) (per curiam), this court rejected the argument that *Feres* could be "restricted to injuries occurring directly in the course of service." According to the court, *Feres* "concluded that [the] Federal Tort Claims Act should not be construed to apply to armed services personnel for injuries not only in the course of but also arising out of activity incident to service." *Id.* Thus, plaintiffs' malpractice claim against army doctors was banned by *Feres*. *Id. See also* Henning v. United States, 446 F. 2d 774, 777 (3d Cir. 1971) (malpractice committed by army doctor on active soldier covered by *Feres* because "*Feres* does not limit its holding to injuries occurring in the course of activity incident to service.") For a good summary of the broad application of the *Feres* doctrine to injuries "incident to service", *see* Woodside v. United States, 606 F.2d 134, 141 (6th Cir. 1979) (recognizing that " 'incident to service' is not a narrow term restricted to military training, field maneuvers, or combat situations" but has been held to cover swimming in an on-base swimming pool, riding a horse from a military stable, and playing in a donkey softball game.)

Secondly, even if we were to find that these considerations should not alone preclude a cause of action for non-battlefield injuries, examination of the other prong of *Bivens* — the existence of alternative remedies — reinforces our decision to act with restraint. Soldiers injured incident to military service are assured free medical care and limited compensation regardless of fault. This is not an instance, as in *Davis*, where there are "no other alternative forms of judicial relief." The choice for Jaffee is not "damages or nothing." While we do not hold that the existence of this limited alternative remedy under the Veterans' Benefits Act would in itself preclude a cause of action,[11] this factor, in conjunction with the effect of suits on the military, counsels us to refrain from finding a new cause of action in these circumstances.

Of course, Congress did not declare in the Tort Claims Act that this compensation scheme is a substitute for a private right of action under the Constitution. No such cause of action existed at that time. Yet the Supreme Court has interpreted the administrative remedy, albeit in a different context, as "exclusive." *Hatzlachh*, 100 S.Ct. at 650. It has invited Congress to amend the Act if it differed with the Court's restrictive interpretation in *Feres*. 340 U.S. at 138. The failure of Congress to pass any amendments in the more than three decades since the decision in *Feres* "leaves little doubt as to congressional intent in this area." *Calhoun v. United States*, 475 F.Supp. at 3 n.2 (opinion of district court adopted by Court of Appeals).[12]

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[11] Clearly, Veterans' Benefits would not fully compensate Jaffee for his losses, and any deterrence of future actions would occur only if the government punished wrongdoers through administrative or criminal sanctions.

[12] The Court observed in *Citizens Nat'l Bank of Waukegan*, that, although the Supreme Court had invited Congress to amend the statute to cover intentional torts against the government, "[a]fter twenty-seven years, the only Congressional response has been silence." 594 F.2d at 1158 n.9.

VI.

Appellants raise various further arguments against our decision not to find a cause of action.

First, appellants suggest that the concerns expressed in *Feres* are no longer significant because the Supreme Court has been willing to restrict immunities in other areas. In particular, they point out that the Court has created a good faith immunity for federal officials in *Butz v. Economou*, 438 U.S. at 504, 508; and for state officials in *Scheuer v. Rhodes*, 416 U.S. at 238-49; and abolished absolute immunity from constitutional claims for municipalities in *Owen v. City of Independence*, 100 S.Ct. at 1409. Even if we were willing to reassess the *Feres* doctrine in light of these cases, however, we are constrained, as a lower federal court, from doing so after the Supreme Court's recent reaffirmation of that doctrine in *Stencel Aero Engineering*.

Moreover, the rationale underlying the immunities that the Supreme Court has been willing to reexamine in other contexts differs from the questions presented in the instant case. In most of these cases, there was no alternative reimbursement available that was comparable to veterans' compensation. In addition, the "peculiar and special relationship of the soldier to his superiors" was not at issue. The Supreme Court has recently reemphasized, albeit in a different factual context, "the lack of competence on the part of the courts" in regulating military affairs. *In Rostker v. Goldberg*, 49 U.S.L.W. 4798, 4800 (June 25, 1981), which upheld all male draft registration, the Court stated:

> It is difficult to conceive of an area of government activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional judgments, subject always to civilian control of the legislative and Executive branches.

Id., quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973). It went on to describe the need for a "healthy deference [of the Court] to legislative and executive judgments in the area of military affairs . . ." *Id.* at 4861. Finally, it noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." *Id.* at 4802, *quoting Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). While the *Rostker* opinion certainly does not suggest the courts should abdicate their responsibility to assure military authorities comply with constitutional mandates, it does indicate judicial intervention in this context should only be undertaken with care and circumspection.[13]

Our decision not to recognize a constitutional cause of action is not, as the dissent suggests, an implicit creation of an intra-service immunity, and it is perhaps important to stress one of the reasons that our decision rests on the ground that it does. We have no doubt that Congress will be free after this decision to create civil remedies that would compensate the plaintiffs in this case, and others who have suffered similar tragedies in similar circumstances. We have serious reservations, however, as to whether Congress would be similarly free to create meaningful and effective causes of action for future cases where various judicially-created immunity defenses are already in place. For that reason, we believe that a *Bivens* "special factors" analysis is the sounder approach. Cf. *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981).

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[13] The analysis set forth by the dissent appears not to permit a logical limit to judicial intervention. If there is *no* circumstance under which there exists an absolute intra-military immunity (Dissent, Typescript at 22) then the dissent must recognize the susceptibility of commanders' battlefield decisions to suit. If, on the other hand, a limit to judicial intervention must be recognized by the courts, our disagreements with the dissent are only as to where the line is to be drawn and on the basis of which doctrine — questions we think have been implicitly answered by Supreme Court precedent.

Appellants' other contention is that the civilian defendants should not benefit from principles announced in *Feres*, even if their military counterparts should. Their argument apparently is that the primary rationale for *Feres* — the special relationship between a government and its soldiers — does not apply when intentional torts are committed by *civilian* authorities. The present suit should therefore state a cause of action against the civilian members of the Defense Department and the Atomic Energy Commission who took part in the challenged decision.

The difficulty with appellants' argument is that the Court in *Stencel*, 431 U.S. at 669, described the service immunity as applying to service injuries occuring at the hands of "Government officials," not simply military officials. Decisions by civilian officials in the Defense Department or Atomic Energy Commission who oversee the military operation and the chain of command implicate many of the same policy considerations as those by their subordinate commanders. In both cases the propriety of military orders would be reviewed in a civilian court of law and the plaintiff soldier would have the full panoply of Veterans' Benefits available to him. Lower federal courts have applied the *Feres* doctrine to suits against the government when the injury occurred at the hands of civilians and was incident to the soldier's service. *See Uptegrove v. United States*, 600 F.2d at 1250-51; *Hass v. United States*, 518 F.2d 1138, 1139-42 (4th *Cir. 1975); Layne v. United States*, 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990 (1962); *Sigler v. LeVan*, 485 F.Supp. at 191; *Frazier v. United States*, 372 F.Supp. 208, 210 (M.D.Fla. 1973). They have also interpreted the doctrine to immunize civilians sued in their individual capacity from liability for negligent torts injuring military personnel during service. *See Hass v. United States*, 518 F.2d at 1143; *Sigler v. LeVan*, 485

F.Supp. at 191. While this issue is not free from doubt, we hold the civilian defendants immune under the facts as alleged in this case.

VII.

THE STATE LAW CLAIMS

It remains for us to examine whether Jaffee's state law claims are viable.[14] For the same reasons that lead us to hold that the plaintiffs have not stated a federal cause of action, we believe that there is no state cause of action.

The Federal Tort Claims Act makes the federal government "liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. §2674. Because "the law of the place where the act or omission occurred" determines the government's liability, 28 U.S.C. §1346(b), suits against the federal government are based on the rules of decisions of the various states. According to *Feres* and its progeny, however, Congress did not intend the Tort Claims Act to allow military personnel to bring tort claims suits for military injuries. The reason for this conclusion, as we have discussed above, was the effect of such suits on military operations and the availability of alternative reimbursement through Veterans' Benefits. Yet, the rationale for precluding Federal Tort Claims Act suits applies equally to suits brought directly under state law. Suits founded on state law have the same potential for undermining military discipline as federal tort claims. In addition, Veterans' Benefits are available for those bringing suits founded on state law, just as they are for those bringing federal tort claims suits.

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[14] The district court dismissed the case on immunity grounds, and it did not reach the question of preemption or whether the court should, in its discretion, exercise pendant jurisdiction over the state law claims in the absence of a federal cause of action. Though normally we might have this issue briefed and argued, under the circumstances of this case, we do not think that further briefing or remand would be advantageous.

Allowing divergent and separate state claims would also directly contravene the third rationale for the decisions in *Feres* and its progeny — the need for uniform legal standards for military personnel, who must frequently travel between the various states. As the Court stated in *Stencel Aero Engineering Corp.*, which was based on *Feres*, "it would make little sense to have the Government's liability to members of the armed services depend on the fortuity of where the soldier happened to be stationed at the time of the injury." 431 U.S. at 671. If military personnel engaged in military exercises in the various states are subjected to the vagaries of 50 different tort law standards, and review by state courts of 50 different jurisdictions, the policies underlying *Feres* would be contravened.

This court reached a similar conclusion in *Bailey v. Dequevedo*, 375 F.2d at 74. There we held that federal law preempts a suit founded on state law against an army doctor for medical malpractice because the policies upon which the holding in *Feres* was based precluded the bringing of such a claim. *See also Martinez v. Schrock*, 537 F.2d 765 (3d Cir. 1976) (en banc) (state suit by retired enlisted man precluded), *cert. denied*, 430 U.S. 420 (1971); *Feres*, 340 U.S. at 143-4; *United States v. Standard Oil Company of California*, 332 U.S. 301, 307 (1946). Although *Bailey* involved a state suit for negligence, it recognized the application of *Feres* to state causes of action. In this case, we have interpreted the principles of *Feres* to apply to intentional torts as well. Just as the underlying rationale of *Feres* would preclude a state suit for negligence, therefore, so should it preclude a state suit for intentional tort. Jaffee's state law claims must be dismissed.

VIII.
CONCLUSION

This is a difficult and troubling decision. The Supreme Court has stated, however, that the interests of the society as a whole are advanced by holding certain individuals acting in special capacities free from legal action.[15] Military service appears to be a situation where the Court would not independently grant a new cause of action under the Constitution.

Our distinguished colleague, Judge Gibbons, has written a forceful and eloquent dissent; however, his references to "the Universal Declaration of Human Rights, the International Covenant on Civil and Political

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[15] The Court has recognized that in certain circumstances an absolute immunity exists for members of the federal government. One such instance — the immunity granted to members of both Houses of Congress with regard to any speech, debate, vote, report, or actions done in session — emanates from the Constitution itself, Article 1, §6. *See* Gravel v. United States, 408 U.S. 606 (1972). Two of the other principal exceptions for judges and prosecutors found their origins in the common law and have been recognized by the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Stump v. Sparkman, 435 U.S. 349 (1978); and Imbler v. Pachtman, 424 U.S. 409 (1976). Absolute immunity was granted to officials acting in these capacities "not because of their particular location within the Government but because of the special nature of their responsibilities." Butz v. Economou, 438 U.S. at 511. Judges and prosecutors are likely to incur numerous and frivolous legal assaults because

> controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. . . . Absolute immunity is thus necessary to assure that judges, advocates and witnesses can perform their respective functions without harassment or intimidation.

Id. at 512. Another important consideration in these decisions was the professional limitations on judicial and prosecutorial excesses provided by appellate judicial review and binding precedent, and the prospect of adversarial scrutiny by adverse parties. *Id.*

Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremburg Code" (Dissent, Typescript at 5-6) somewhat distort the holding of the majority in this case. The majority neither endorses nor sanctions a concentration camp mentality. It is important to remember that what we are called upon to decide is simply whether the plaintiffs are entitled to money damages, in addition to the compensation provided by Veterans' Benefits, assuming of course that they can establish wrongdoing on the part of the defendants. Thus, the issue is not civilian control over the military, as the dissent implies, but the amount of money the plaintiffs may recover.[16]

Our decision today would not preclude Congress from passing a statute establishing a federal cause of action. It holds only that these are special circumstances where a court should not act against or independently of congressional direction. In deference to the hard policy judgments made by the Supreme Court on this issue, we will affirm the dismissal by the district court.[17]

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[16] Left unexplained by the dissent's analysis is why servicemen severely wounded in battle should receive less than those with similar injuries incurred in peacetime. The resolution of that troubling issue is properly one for Congress, which it has answered by adopting a schedule of benefits based on the extent of disability, rather than on its cause.

[17] Because of our disposition of this case, we do not reach appellees' alternative arguments that the defendants are, as the district court held, immune from suit, or that the district court lacked personal jurisdiction and proper venue over the defendants.

HUNTER, *Circuit Judge*, concurring with whom Judge Aldisert joins:

1. I join in the majority opinion in all respects except to the extent that it predicates its decision upon a forecast of how the Supreme Court would decide the instant case. *See* Majority Opinion, typescript at 3.

2. I believe that it is neither sound policy nor sound jurisprudence for the court of appeals, in a case involving only questions of federal law, to base its own decision upon a prophecy of how the Supreme Court would decide the same case. This court's fundamental responsibility in non-diversity cases is to arrive at an independent decision based upon a reasoned analysis of applicable legal precepts and precedents — including, of course, relevant Supreme Court decisions. Predictions of how the Supreme Court would decide the case have no place in that analysis. As one commentator has concluded, "it seems questionable whether, in any case, a court of review would find it helpful to be presented with the prediction of its own future trends, rather than with a direct statement of the lower court's reasoned review on law and policy." 44 Colum. L. Rev. 565, 570 (1944) (criticizing the second circuit's decision in *Spector Motor Service v. Walsh,* 139 F.2d 809 (2d Cir.), vacated, 323 U.S. 101 (1944), *on remand,* 181 F.2d 150 (2d Cir. 1950), *rev'd,* 340 U.S. 602 (1951)).

3. I therefore join in the majority's opinion, not because of any prediction of what the Supreme Court might do, but because an independent analysis of the applicable law and policy discussed in Judge Higginbotham's opinion leads me to conclude that the result is the correct one. In sum, our responsibility is to decide the case in the way that we think is right — right because we believe it to be right — and not because we project that the Supreme Court might agree with our decision.

ADAMS, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the majority that the plaintiffs in this case may not assert a cause of action implied directly from the Constitution, although I disagree with the majority's disposition of the state law claims. The reasoning that leads me to agree on the federal question, however, varies from that of the majority in that it focuses on a different element of the test for inference of a constitutional damages remedy. It is for this reason that I write separately to explain my views.

I.

When the Supreme Court, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), first recognized the entitlement, in the absence of statute, to recover damages for violations of constitutional rights committed by federal officials, it acknowledged that not all constitutional infractions could be redressed in this manner. Specifically, the Court suggested that a damage action would fail if either of two conditions obtained. First, there might exist "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. Second, Congress might have declared that victims who suffer a particular type of constitutional injury at the hands of federal officials have no right to recover money damages, "but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397. Subsequent cases have reaffirmed these limitations on the *Bivens*-type remedy. *See Davis v. Passman*, 442 U.S. 228, 245 (1979); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Purtill v. Harris*, No. 81-1187, slip op. at 4-7 (3d Cir. Aug. 24, 1981).

The majority today concludes that this case presents "special factors counselling hesitation" in the implication of a cause of action under the Constitution.

It does not decide that defendants in this case are immune from suit by analogy to *Feres v. United States*, 340 U.S. 135 (1950) (general waiver of sovereign immunity inherent in Federal Tort Claims Act not applicable to negligence action brought by soldier for service connected injury). Rather, it suggests that the considerations underlying *Feres* immunity help inform a decision on whether "special factors" foreclose Jaffee's lawsuit. The majority concludes that the policies that favored sovereign immunity from negligence liability in *Feres* apply as well in reaching a conclusion that a soldier may not proceed with a suit against individual defendants for redress of intentional wrongs.

My uneasiness with this analysis stems from *Davis v. Passman*. There the Supreme Court, in deciding that a Congressional staff member intentionally discharged on the basis of her sex could bring against her former employer a suit premised on the Due Process Clause of the Fifth Amendment, considered whether a suit against a Congressman raises "special factors counselling hesitation." The Court acknowledged that such concerns exist, but held that they are coextensive with the protections which the Speech or Debate Clause affords. 442 U.S. at 246. If that Clause does not shield a Congressman's actions, the Court proclaimed, the legislator ought to be bound by the law as are other citizens. *Id.* (citing *Gravel v. United States*, 408 U.S. 606, 615 (1972)). In effect, the Court's analysis appeared to render disposition of the "special factors" issue inseparable from resolution of the immunity question. Analytically, the Court might have remanded for a determination of immunity under the Speech or Debate Clause, and postponed decision on the existence of a constitutional cause of action until a lower court had ascertained whether immunity, and thus a "special factor," shielded the defendant from suit. Instead, the Court in essence eliminated consideration of "special factors," held that a cause of action under the Fifth Amendment was available, and remanded for consideration of whether a constitutional immunity blocked prosecution of the cause of action.

For purposes of the "special factors" inquiry, it is difficult to distinguish the case at bar from *Davis v. Passman*. The conventional defense of military officials who are sued (and the defense on which defendants in this case have relied) is immunity — not a constitutional immunity like that asserted in *Davis v. Passman*, but a common law military immunity ultimately derived from *Feres*. Moreover, it would appear equally true of military officials as of legislators that, absent immunity, they should be held accountable for violations of legal norms. In light of *Davis v. Passman*, I cannot avoid regarding the "special factors counselling hesitation" as congruent with the scope of military immunity. If the "special factors" question constituted the sole inquiry in a case placing in issue the inference of a direct, constitutional cause of action, I would think that the Supreme Court's disposition of *Davis* might well control the present case. We initially would hold that Jaffee could assert a cause of action under the Constitution, and then would face the question whether the immunity established in *Feres* — immunity of the Government from negligence suits arising out of service-connected injuries — should be extended to shield individual military and civilian defendants from suits based on intentional malfeasance.

II.

Absent the element of "special factors," the Supreme Court has declared, the implication of a constitutional cause of action may be precluded when Congress has provided an adequate alternate remedy. Recently, the Supreme Court addressed this component of the *Bivens* standard in *Carlson v. Green*. In upholding a cause of action based on the Eighth Amendment, the Court stated that a defendant can defeat implication of a cause of action if he "show[s] that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19. Defendants in *Carlson* had identified the Federal Tort Claims Act as an adequate alternative to a damages remedy. The Court, however, found no indication that Congress intended the FTCA to preempt a *Bivens*-type remedy; to the contrary, it asserted that recent amendments to the FTCA made it "crystal clear," *id.* at 20, that Congress regarded the FTCA and *Bivens* remedies as parallel and complementary. More generally, the Court cautioned that no "magic words," *id.* at 19 n.5, need be discovered in the legislative history; instead, "our inquiry . . . is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy. When Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, . . . that congressional decision should be given effect by the courts." *Id.*[1]

In the case at hand, I believe that Congress viewed the compensation system available to injured veterans under the Veterans' Benefits Act, 38 U.S.C. §301 *et seq.*, as an adequate remedy within the reasoning of *Carlson v. Green*. Before applying the *Carlson* standard, two distinctions between that case and the present controversy should be noted. First, Congress adopted the current Veterans' Benefits Act in 1958,[2] thirteen years before the Supreme Court's decision in *Bivens*. Because the Veterans' Benefits Act predated the Court's anticipated approval of a damage action based directly on the Constitution, it comes as no surprise that its legislative history fails to disclose a Congressional declaration that benefits under the Act are to substitute for the constitutional damages action. While the same is true of the FTCA, the Supreme Court in *Carlson* had the benefit of a post-*Bivens* amendment to the Federal Tort Claims Act which explicitly addressed the coexistence of statutory and constitutional causes of action. The post-*Bivens* amendments to the Veterans' Benefits Act do not manifest a similar Congressional intent — again not surprisingly, since at the time of the amendments to the Veterans' Benefits Act no court had recognized a cause of action based directly on the Constitution and intended to redress service- related injuries. Under the circumstances, I do not understand *Carlson* to require an explicit Congressional declaration of the exclusivity of veterans' compensation. In a case like the present one, where the relevant legislative history antedates *Bivens*, I would look for a Congressional declaration concerning the adequacy, rather than the exclusivity, of the statutory remedy.[3] When scrutinizing the activities of a pre-*Bivens* Congress, I would hold that discovery of a Congressional intention to establish a comprehensive compensation scheme for injuries sustained in the military service will foreclose a private cause of action premised on the Constitution.

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[1] This court has recently emphasized that *Carlson* calls for an inquiry into the implicit intent of Congress to exclude *Bivens*-type remedies, and not merely for a mechanical search for an expressed intent. In *Purtill v. Harris*, No. 81-1187, slip op. at 4-7 (3d Cir. Aug. 24, 1981), the court, in an opinion by Judge Aldisert, examined both the comprehensiveness of remedies under Section 15 of the Age Discrimination in Employment Act, 29 U.S.C. §633a, and the legislative histories of ADEA and of Title VII of the Civil Rights Act. The court was able to conclude, without citing any explicit Congressional statement in support, that Congress intended the ADEA to preclude *Bivens* remedies for age discrimination claims by federal employees. *Id.* at 6.

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[2] The 1958 Act was "essentially a consolidation of all of the existing laws administered by the Veterans' Administration." S. Rep. No. 2259, 85th Cong., 2d Sess. 1 (1958), *reprinted at* 38 U.S.C.A. app. at 111. The Act, which made only relatively minor changes in the law, was for the most part an "accurate restatement" of existing rules. *Id.* Veterans' benefits have a history virtually as old as the Republic. *See* Act of March 23, 1792, ch. XI, §2, 1 Stat. 244 (servicemen injured during American Revolution entitled to pension); Act of Apr. 23, 1800, ch. XXXIII, §8, 2 Stat. 53 (seamen disabled in line of duty entitled to pension not exceeding one-half monthly pay).

A second difference between *Carlson* and the case at issue here derives from the nature of the alternative remedy. In *Carlson*, which involved a claim by a mother on behalf of her deceased son against federal prison officials who were alleged to have intentionally deprived him of necessary medical care, plaintiff's choice was between two lawsuits, one based on the Constitution and one on the FTCA. As between these two, the Supreme Court found the *Bivens* action more effective, adducing four reasons for this conclusion: constitutional actions have greater deterrent force, allow for the recovery of punitive damages, may be tried to a jury, and are governed by a uniform body of federal, rather than a divergent body of state, law. The Court concluded that the possibility of suit under the FTCA did not indicate a Congressional resolve to preclude a more effective suit directly under the Constitution.

In contrast to *Carlson*, where a comparison of two damages actions could illumine Congressional intent, the alternative to a lawsuit based on the Constitution is, in the present case, a statutory benefits scheme rather than a judicial action for damages.[4] Because of the different character of the two possible routes to recovery, I doubt whether an analysis which tracks the four factors that distinguished the *Bivens* action from the FTCA action in *Carlson* would support an inference concerning Congressional views on the adequacy of its compensation plan.[5] To be sure, several of the reasons set forth in *Carlson* for preferring the *Bivens* remedy likewise distinguish that alternative in the situation before us: trial of a cause of action based on the Constitution may result in an award of punitive damages and might have greater deterrent value than an award under the veterans' benefits program. Moreover, a plaintiff remitted to the statutory benefits scheme concededly might receive an award significantly less than his possible damages in a successful lawsuit. On the other hand, the barriers to recovery are likewise lower under the Veterans Benefits Act, and the benefits, if modest, are reasonably assured. *See, e.g.*, 38 U.S.C. §§318, 333 (presumptions in favor of service-relatedness of disabilities). In light of the inherent differences between civil suits for damages and claims for statutory benefits, I believe that the superiority in some respects of the *Bivens* remedy has a limited bearing on the determination whether Congress intended its veterans' benefits system to provide adequate compensation.

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[3] Although the focus on adequacy is not explicit in *Carlson*, I believe this approach to be consistent with that decision. The Court in *Carlson* stated that when a contemporary enactment suggests that a statutory remedy is "adequate" only when supplemented by a *Bivens* remedy, a constitutional claim for damages is not precluded. 446 U.S. at 19 n.5. The converse of this proposition would appear to be that when Congress states that its remedy *is* adequate, without reference to a *Bivens* cause of action, a constitutional claim for damages might be precluded.

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[4] Like *Carlson*, the other Supreme Court cases on implication of a constitutional cause of action did not arise in the context of a statutory compensation scheme. In *Bivens*, the plaintiff faced the choice of "damages or nothing," 403 U.S. at 410 (Harlan, J., concurring); the asserted violation of plaintiff's Fourth Amendment rights had already occurred, rendering injunctive relief unsatisfactory, and the Court gave no indication that an assured compensation scheme would provide monetary redress for the wrong. Similarly, in *Davis v. Passman* the deprivation of rights would remain uncompensated if the constitutional lawsuit could not proceed. Even in *Carlson*, the plaintiff faced a "damages or nothing" choice — the only question was which of two possible damages remedies he could pursue. By contrast, the plaintiff here has an alternative to a suit based on the Constitution, and that remedy does not require judicial resolution of a claim as a prerequisite to an award of damages. Rather, a claimant under the Veterans' Benefits Act need only show the existence of service-related damages.

[5] It should be noted that the Supreme Court in *Carlson* compared the *Bivens* and FTCA remedies in order to help ascertain whether Congress intended to limit the plaintiff to an FTCA action. *See* 446 U.S. at 20-21. The comparison thus was ancillary to the central issue of Congressional intent; the Court did not announce a general rule that a constitutional cause of action must be implied whenever it would be superior in some respects to an alternative remedy. Instead, the so-called superiority factor was just one element in ascertaining Congressional intent.

The Eighth Circuit, acting in the wake of *Carlson v. Green,* also has interdicted a cause of action based directly on the Constitution when an adequate administrative remedy exists, notwithstanding the failure of Congress to denominate the alternative as an exclusive remedy. In *Bishop v. Tice,* 622 F.2d 349 (8th Cir. 1980), plaintiff sought damages under the Fifth Amendment for his allegedly wrongful discharge from federal employment. The court of appeals, however, noted that a federal employee is entitled to an administrative challenge to his dismissal on the ground that there was no sufficient cause for the discharge. *See* 5 U.S.C. §7701. If successful, the employee is entitled to reinstatement and back pay. This administrative process, the Eighth Circuit held, would adequately redress any violations of plaintiff's substantive rights under the Due Process Clause, thereby obviating the need for a *Bivens* remedy. 622 F.2d at 356-57.

The Fifth Circuit has followed the rationale of *Bishop v. Tice* in *Bush v. Lucas,* 647 F.2d 573 (1981). *Lucas* involved a law suit directly under the Constitution by a Government employee seeking damages from his supervisor for an alleged retaliatory demotion. In denying the employee a right of action under the Constitution, the court disavowed reliance on the "alternative remedy" prong of the *Carlson* test. Its analysis of the "special factors" prong, however, turned largely on the availability of a comprehensive remedial scheme reflecting an effort by Congress to "achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action." The court concluded, "The very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the government's responsibilities toward its civil service employees." *Id.* at 576-77. Although the court ultimately incorporated this analysis under a "special factors" heading, it appears that *Lucas* would have been governed by *Davis v. Passman* but for the presence of an alternative remedial scheme. Thus, the Fifth Circuit's emphasis on the Congressionally-created alternative supports the analysis presented here and in *Bishop v. Tice* as to the sufficiency of a comprehensive alternative remedy to indicate a Congressional intent to preclude *Bivens* actions.

As I read *Bivens, Passman, Carlson, Tice,* and *Lucas,* the dispositive question here is whether Congress has created a comprehensive benefits scheme which it regards as fully adequate for the compensation of injured servicemen.[6] If this question is answered in the affirmative, a private cause of action for damages, based directly on the Constitution, is precluded, even though such a remedy might, if allowed, result in a larger recovery for the injured veteran.

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[6] This past term, the Supreme Court applied a similar analysis to the availability of a cause of action under 42 U.S.C. §1983. In Middlesex County Sewage Authority v. National Sea Clammers Association, 69 L. Ed. 2d 435 (1981) the Court considered, *inter alia*, the availablilty of such a private right of action for damages resulting from discharges and ocean dumping of sewage. It noted that Congress had created "elaborate enforcement provisions" under the Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401 et seq., which covered the activities in question. 69 L. Ed. 2d at 446. Citing *Carlson* as analogous authority, the Court rejected any Section 1983 right of action, reasoning that "When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under §1983." *Id.* at 450. By parity of reasoning, a preclusive intent similarly may be inferred from a comprehensive scheme such as the Veterans' Benefits Act, which provides federal benefits to compensate for a wide range of injuries.

Although I recognize that there is room for disagreement, two considerations persuade me that the required legislative indications exist. First, the Senate Report to the 1976 amendments to the Veterans' Benefits Act states: "The [Congress] periodically reviews the service-connected disability compensation program to ensure that authorized benefits provide *reasonable and adequate compensation* for disabled veterans." S. Rep. No. 94-1226, 94th Cong., 2d Sess., at 10 (1976) (emphasis added), *reprinted at* [1976] U.S. Code Cong. & Ad. News 2537, 2541. *See also* H.R. Rep. No. 463, 78th Cong., 1st Sess. 1 (1943), *reprinted at* [1943] U.S. Code Cong. Serv. 2-159 (purpose of 1943 veterans' benefits legislation was "to provide more adequate . . . veterans' laws pertaining to compensation, pension, and retirement pay"). I interpret this statement to indicate that Congress has assumed responsibility for ensuring adequate compensation for service-connected injuries. And under *Carlson v. Green*, it would appear that no greater showing of legislative purpose is required.

Statements in a recent Supreme Court case buttress this inference. In *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (per curiam), an importer sued to recover the value of goods lost by the customs service after they had been seized for an alleged customs violation. In deciding in favor of the claimant, the Court distinguished *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), which denied Government liability to indemnify a third party for damages paid to a member of the armed forces injured in military training.[7] The Court in *Hatzlachh* interpreted its earlier decision in *Stencel* to be based on the "recogni[tion] that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the *sole remedy* for service connected injuries." 444 U.S. at 464 (emphasis added). The Court continued: "In *Stencel*, Congress had provided a remedy, which we thought to be exclusive." *Id.*

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[7] The injured serviceman, Captain John Donham, was awarded a lifetime pension under the Veterans' Benefits Act, but nonetheless brought a negligence action against Stencel, which had manu-

The Supreme Court's statements in *Hatzlachh* concerning the exclusivity of veterans' benefits are admittedly dictum. Nonetheless, in my view they reflect an understanding on the part of the Court that Congress has shouldered the weighty responsibility of assuring an effective and reparative compensation arrangement for injured military personnel. Standing alone, the Court's remarks might not be persuasive of Congressional intent. But when those remarks are joined with the statement in the Senate Report, I believe it is reasonable for us to infer that Congress has undertaken to guarantee adequate compensation for service-connected injuries, thereby satisfying the *Carlson v. Green* standard for preclusion of a cause of action implied directly under the Constitution.

III.

Several additional observations are in order. First, I wish to emphasize the limited applicability of my view of Mr. Jaffee's case. I would hold only that a suit for damages asserted *directly under the Constitution* is barred when Congress has devised a compensation scheme intended to provide adequate benefits for injured parties. This rule would not preclude a party from receiving

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NOTE 7 — *(Continued)*
factured the product responsible for causing his injury. *See* 431 U.S. at 667-68. Nothing in this opinion questions the right of a serviceman simultaneously to receive veterans' benefits and to initiate a legal action based on a common law tort theory. *See* Part III *infra*. Thus the adequacy or exclusivity of veterans' compensation would not bar a non-constitutional action like Donham's.

benefits and simultaneously pursuing a judicial remedy created, for example, by a non-constitutional provision of federal law. Nor would it compel the conclusion that a federal compensation scheme automatically forecloses any remedy under state law. Thus I do not challenge the continued vitality of *Wilkes v. Dinsman*, 48 U.S. (7 How.) 122 (1849); 53 U.S. (12 How.) 401 (1851), where the Supreme Court allowed a marine to prosecute an action for trespass against his commanding officer, based on the latter's infliction of imprisonment and corporal punishment after the marine's term of enlistment had allegedly expired.[8] There is, so far as I know, no Supreme Court precedent for extinguishing a traditional common law cause of action whenever Congress has provided an alternative compensation system. But in my view *Bivens* and its progeny establish that Congressional creation of an adequate alternative will defeat what, at least until recently, has been regarded as an extraordinary remedy — the implication of a cause of action for damages directly under the Constitution.

The district court dismissed the Jaffees' state law claims as barred by the *Feres* doctrine of absolute immunity. Although the majority does not decide the issue of absolute immunity, it disposes of the state claims by concluding that they are preempted by federal law. In resting its holding on preemption grounds, the majority is reaching out and deciding an issue that was not considered by the district court and was not briefed or argued by the litigants before this Court. Such an approach does not offer the parties a fair chance to be heard, and thus would not appear to be prudent. Because I believe, as the dissent has argued, that absolute immunity does not govern this case, proper resolution of the state claims requires careful consideration of several issues. For that reason, I would return this case to the district court. A remand for this limited purpose would leave a number of questions for the district court to consider: whether to exercise its pendent jurisdiction so as to permit these claims to proceed in federal court; whether the qualified immunity doctrine of *Butz v. Economou,* 438 U.S. 478 (1978), protects the defendants; whether plaintiffs assert a valid cause of action under state law; and whether such a cause of action is nevertheless preempted by federal law.

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[8] Whatever the merits of *Dinsman*, decided more than a century ago, it remains the law, and indeed has been cited several times in the recent past by the Supreme Court. *E.g.*, Butz v. Economou, 438 U.S. 478, 492-94 (1978). If it is to be overruled, the Supreme Court should do it. An intermediate appellate court obviously does not possess such authority.

Allegations in Jaffee's complaint — which we must accept as pleaded — maintain that the defendants, through their wilful actions, exposed him and other servicemen to lethal dosages of radiation. If it should be established that the Camp Desert Rock exercise was in fact conducted despite knowledge by the defendants of the gross dangers it presented, then the harm that ensued might well merit special Congressional attention. Indeed, even in the absence of such a showing Congress may wish to take some action. We note that Congress has recently enacted a bill to expand the availability of medical coverage under the Veterans' Benefits Act both for Vietnam War veterans exposed to the herbicide Agent Orange and for veterans suffering from injuries that appear to have resulted from nuclear weapons tests. H.R. 3499, 97th Cong., 1st Sess., 127 *Cong. Rec.* 11572 (Oct. 16, 1981). Although presidential action on the bill is still pending, this legislative attention to those in Jaffee's situation, and Congress's use of the Veterans' Benefits Act as the appropriate vehicle for redress, provide dramatic illustration of the extent to which Congress has taken on the responsibility for dealing with grievances arising out of military service, such as those advanced by Jaffee here.

IV.

It is perhaps understandable that cases like the present one can evoke strong emotional tugs regarding the alleged plight of the plaintiff or the problems besetting the defendants. But the role of the court is not to take sides: rather, it is expected to analyze, carefully and quietly, the precedents as well as the legislative efforts in order to arrive at a fair and just result. It is important, too, for the judge to realize that there are other bodies in our society that deal with these problems — the Executive, the Congress and the public itself. The use of epithets and slogans does not solve thorny legal problems. Instead, it tends to obfuscate the issues, issues that are difficult enough even under the best of circumstances. As Justice Holmes taught us, we must use care lest we interject the judiciary into heated controversies that are best settled by the operation of political forces.[9]

For all these reasons, I believe that the appropriate course — considering the prior decisions of the Supreme Court and paying heed to the words as well as to the deeds of the Congress — is to remand this matter for the limited purpose of having the district court address the questions relating to the claim of a state law cause of action. Aside from that, at least as I see it, any action accruing under the Constitution has been foreclosed, under the tests in *Bivens* and *Carlson* and by the actions of Congress.

Judge Rosenn joins in this opinion.

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[9] The following statement by Judge Learned Hand might also be an appropriate guide in a situation such as this:

> But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

Hand, the Spirit of Liberty 109 (3d ed. Employed 1960).

GIBBONS, *Circuit Judge*, with whom Judge Sloviter joins, dissenting:

I

This case is before us on an appeal from an order dated March 20, 1979, entered as a partial final judgment pursuant to Fed. R. Civ. P. 54(b), dismissing plaintiffs' claims for money damages from the individual defendants on the ground that those defendants all enjoy absolute immunity from such suits. The plaintiffs are Stanley Jaffee, who was drafted into the United States Army in 1952 and served as an enlisted soldier until April of 1954, and Sharon Blynn Jaffee, his wife. Both are now civilians, Mrs. Jaffee never having been a military person. The district court dismissed on the pleadings, and thus for our review we must take as true the allegations of the complaint.

The Jaffees charge that in the spring of 1953, while Mr. Jaffee was serving on active duty at Camp Desert Rock, Nevada, he and other soldiers were ordered to stand in an open field near the site of an explosion of a nuclear device without any protection against radiation; that the explosion exposed Jaffee and others to massive doses of radiation; that the defendants, civilians and military, responsible for ordering the attendance of the soldiers at the explosion site knew they were exposing the soldiers to grave risk of injury and death from the resultant exposure to radiation, but in disregard of this knowledge compelled Jaffee and others to be so exposed; that the defendants acted in excess of their authority; that there did not exist any sufficient legitimate purpose, military or otherwise, to justify exposing the soldiers to the dangers of radiation; and that the defendants knowingly, deliberately and recklessly conducted dangerous experiments on the bodies of the soldiers without their knowledge, permission and consent. Jaffee alleges that as a result of the exposure: he developed cancer which has required surgery, he has inoperable lymphatic cancer, he has been permanently injured, his life has been materially shortened, and he continues to suffer substantial pain, disability, emotional and mental anguish, and loss of enjoyment of life's pleasures. He alleges as well that he has incurred, and will incur in the future, medical and other expenses. Reading the complaint, as we must, in the manner most favorable to Jaffee, we must assume that he could at trial prove medical and other expenses beyond those, if any, provided by the United States. Mrs. Jaffee alleges that she has been and will continue to be deprived of Jaffee's services, society, consortium and companionship, and has been and will continue to be liable for his medical expenses. As with Jaffee's claim, we must assume at this stage that she could prove that she incurred liability for medical expenses beyond any provided by the United States. The complaint charges that the acts of the defendants violated the rights of plaintiff, Stanley Jaffee, and other similarly situated soldiers under the First, Fourth, Fifth, Eighth and Ninth Amendments to the United States Constitution and were tortious under the laws of the various states.

These allegations charge a violation of human rights on a massive scale. The plaintiffs seek to prove, and we must at this stage assume that they can, that civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous.

In *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 1961 (1979), we considered a separate count which named only the United States as a defendant. That count sought notification to and medical treatment for all soldiers who were exposed to radiation at the Camp Desert Rock exercise. In our prior opinion we noted that in the class action plaintiffs did not rely upon the Federal Tort Claims Act of 1946, 28 U.S.C. §§1346 (b), 2671-80 (1976). Although the government vigorously resisted any relief, we held that the 1976 amendments to section 702 of the Administrative Procedure Act, 5 U.S.C. §702 (1976), waived sovereign immunity with respect to the claim for a mandatory injunction to compel notice to a class of potential victims. 592 F.2d at 718-20. We also held that absent a waiver of sovereign immunity by Congress no court could order compensatory relief from the Treasury of the United States. 592 F.2d at 718. *See* U.S. Const. art I, §9, cl. 7. The claims which are before us on this appeal do not seek monetary relief from the Treasury of the United States, and were not before the court on the prior appeal.

The sole ground relied on by the district court in dismissing the claims now before us was that the defendants, both military and civilian, enjoyed absolute immunity from suit, even when charged with intentional, unauthorized tortious conduct. On appeal a panel of this court unanimously reversed the district court's March 20, 1979 order holding that there is no such absolute immunity.[1] Thereafter the Department of Justice, which has from the outset appeared in the action on behalf of the individual defendants, filed a petition for rehearing en banc which was granted on April 11, 1980. The petition for rehearing addressed the question "whether the *Feres* doctrine provides an absolute intra-military immunity for tort suits." Since the district court's immunity holding would apply equally to claims based on federal or state law, there was no occasion for the appellants to address the applicability of state law either before the panel or before the court en banc. Defendants' only contention before the district court with respect to plaintiffs' state law claims was that they should not be considered because there is no independent basis for federal jurisdiction.[2] That contention is meritless in light of the holding in our prior appeal, and the defendants did not brief the state law issues except for the claim of absolute immunity.

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[1] The panel opinion is discussed in Note, *Government Immunity And Liability-Armed Forces-Government Officials Charged with Violating Servicemen's Fifth Amendment Rights Not Entitled to Absolute Immunity*, 11 Seton Hall L. Rev. 275 (1980).

The present opinion of the court, authored by a judge who joined in the panel judgment reversing the dismissal of the claims against individual defendants, purports not to decide the appeal on immunity grounds. Instead, without briefing from either party in the district court or here, the court irresponsibly affirms the dismissal on what it claims is a different theory: that under federal or under state law a charge by a serviceman that he was subjected to the intentional tort of involuntary human experimentation, without legal authority and without military justification, fails to state a claim upon which relief can be granted in any court.

The Twentieth Century has witnessed time and again, in this country and elsewhere, the fragility of those protections which the legal order affords against human rights violations. One of those fragile protections is the admonitory law of intentional torts, designed to require public accountability for individual conduct, official or private, going beyond the bounds of social acceptability. Certainly the conduct charged in the complaint, if proved, transgressed those bounds. Indeed the complaint alleges conduct which would violate the Universal Declaration of Human Rights,[3] the International Covenant on Civil and Political Rights,[4] the Geneva Convention,[5] the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[6] and the Nuremberg Code.[7] The international consensus against involuntary human experimentation is clear. *A fortori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt. That any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts is surprising. That it should be an American court will dismay persons the world over concerned with human rights and will embarrass our Government. That this court, which once had a deserved reputation for sensitivity to human rights issues, should undertake to do so is a saddening demonstration of the extent to which it has lost the spirit which once animated our deliberations.

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[2] Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, Point V.

[3] G.A. Res. 217A, U. N. Doc A/810, at 71 (1947).

[4] G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, 52, U.N. Doc. A/6316 (1966).

[5] 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, Aug. 12, 1949.

The opinion of the court is couched in terms of unwillingness to create a "new" cause of action. This cloak of deference to the legislative branch is disingenuous, for what the majority has done, by radical judicial legislation with totalitarian effects, is to wipe out causes of action designed to require official accountability. These causes of action have been a part of the common law for centuries and were recently reapproved by the Supreme Court. Moreover, while the opinion of the court purports not to reach the issue of defendants' immunity, the very cases it relies upon expose the plain fact that this is an immunity decision masked as something else.[8] But whether the majority's result is couched in terms of the absence of a claim on which relief can be granted or in immunity terms, its radical totalitarianism cannot be denied, for it removes a large class of heretofore protected citizens from the law's shield against willful torts.

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[6] G.A. Res. 3452, Annex Art. 1 (Agenda Item 74), 30 U.N.GAOR, Supp. (No. 34) 91, U.N. Doc. A/10408 (1975).

[7] G.A. Res. 161, U.N. Doc. A/PV55, at 2244 (1946).

[8] Part I of Judge Adams' opinion makes plain that the opinion of the court rests on its misinterpretation of official immunity caselaw.

One justification advanced for removing that protection is that military necessity demands it. The military necessity justification, according to the majority, has two aspects: the need for encouraging unquestioned obedience by inferiors (the serviceman as automaton principle), and the need for aggressiveness in decision making by military superiors (the macho principle). Of these justifications, only the macho principle applies to Mrs. Jaffee, who never was a member of the armed forces, since the presumed need for unfettered discretion is no less applicable to suits by civilian victims of intentional military conduct. Her claim has been dismissed without discussion. Thus the logic of the majority's decision will bar actions by civilians for intentional torts committed by the military. That result is a prospect which should send chills up the spine of anyone interested in personal liberties, for there is no way to distinguish between the intentional tort of involuntary human experimentation and intentional torts directed at areas of privacy or expression. The other justification advanced by the majority is that Congress, in enacting veterans benefit legislation, intended the result. The rationale of the opinion of the court is not limited, however, to cases in which veterans benefits are available. It applies to all intentional torts, even those which do not produce permanent physical disability. Moreover, the majority's assumption that Congress intended veterans benefits as a substitute for common law remedies for intentional torts is supported by no evidence in the veterans benefit statutes or their legislative history. Thus none of the grounds advanced as support for the majority's result will withstand scrutiny. The real but unarticulated reason for the result is that the availability of a private remedy for intentional torts will encourage public accountability of the military, while foreclosing such a remedy will encourage concealment (the coverup principle).

II

In concluding that there is no federal common law cause of action for alleged conduct which all would concede would violate the standards for official conduct specified in the Constitution, the opinion of the court attempts to identify "special factors counselling hesitation." But as Judge Adams demonstrates in Part I of his opinion, the "special factors counselling hesitation" on which the opinion of the court relies are the very same factors which have been advanced in support of absolute federal common law military immunity derived from *Feres v. United States*, 340 U.S. 135 (1950). Indeed the chief source for the "special factors counselling hesitation" is the Feres opinion. If in fact that opinion lends no support to the defendants' absolute immunity contention, then the main premise for the court's rejection of a *Bivens* remedy disappears. Thus in any real sense the opinion of the court is a federal common law immunity holding. The starting point for analysis of the justification for dismissing the complaint should therefore be the federal common law cases on official immunity. For sound analysis these cases must be distinguished for two reasons from cases involving the construction of statutes waiving sovereign immunity for suits to recover money from the United States Treasury. First, federal sovereign immunity has constitutional underpinnings. U.S. Const. art I, §9, cl. 7. Unlike official immunity it is not a creature of judge-made law. Second, in construing a statute waiving federal sovereign immunity, the intention of Congress, expressed not only in the waiver statute but in other statutes bearing on the question, should be controlling because only Congress can waive the Treasury Department's immunity. By contrast, official immunity involves not the extent to which a constitutionally based sovereign immunity has been waived, but rather the extent to which a judge-made federal common law grant of special privilege should be enlarged. In suits for money from the Treasury, immunity is the rule and waiver the exception. In suits against individuals, accountability is the rule, and an immunity which prevents accountability is the exception. With these distinctions in mind, it is appropriate to examine the lines of authority on which the defendants and the opinion of the court rely. Those lines of authority, which foreshadowed the legal problem presented in this appeal, stem from two cases which were before the Court of Appeals for the Second Circuit in October 1949. One was *Feres v. United States,* 177 F.2d 535 (2d Cir. 1949), *aff'd,* 340 U.S. 135 (1950). The other was *Gregoire v. Biddle,* 177 F. 2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

In the *Feres* case, the executrix of a deceased soldier sought recovery under the Federal Tort Claims Act against the United States for the death of her husband, who had died by fire in military barracks. Neligence was alleged in quartering him in barracks known to be unsafe. Judge A. Hand refused to construe the three-year-old Federal Tort Claims Act to cover injuries suffered while on military duty and distinguished the recently decided *Brooks v. United States,*[9] on the ground that *Brooks* involved an injury to an off-duty soldier. As to injuries suffered while on duty, Judge A. Hand found the military pension system to be an exclusive remedy. In the same month, Judge Murrah, writing for the Tenth Circuit in *Griggs v. United States,* 178 F.2d 1 (10th Cir. 1949), *rev'd,* 340 U.S. 135 (1950), reached the opposite conclusion. The Supreme Court resolved the conflict in favor of the Second Circuit view.[10] However, what Justice Jackson's opinion in *Feres* stands for is a matter of some dispute and confusion — confusion which the opinion of the court in this case compounds.

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[9] 337 U.S. 49 (1949) (holding that a member of armed forces may recover under FTCA for injuries not incident to his service resulting from the negligence of government employee).

[10] 340 U.S. at 146. In the *Feres* opinion the Court also considered the case of Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *aff'd,* 340 U.S. 135 (1950), in which the Fourth Circuit agreed with the Second Circuit *Feres* holding.

In *Gregoire*, a Frenchman filed a complaint charging that two successive Attorneys-General, two successive directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island had conspired to arrest him on the pretense that he was a German enemy alien and had kept him in custody from January 5, 1942 until September 18, 1946, when he was released on a writ of habeas corpus. Gregoire sought money damages from the alleged conspirators. Judge L. Hand, for the court, affirmed a Rule 12(b)(6) dismissal of the complaint on the ground that each defendant, as a high executive branch official, enjoyed absolute immunity even if he acted out of evil motives.[11] Judge L. Hand relied on *Spalding v. Vilas*, 161 U.S. 483 (1896), which recognized official immunity of the Postmaster General, a cabinet officer, from a suit arising out of an official communication. *Gregoire* was not reviewed by the Supreme Court.

In *Feres*, Judge A. Hand construed a recently enacted statute authorizing the imposition of tort liability for personal injury against the United States, and attempted to reconcile it with another statutory scheme for the payment of federal benefits. In *Gregoire*, Judge L. Hand did something quite different. He considerably extended a judicially created personal immunity doctrine to civil actions against high executive officials. As noted above, the two tasks are not coextensive, and the reasons that might favor narrow constructions of the federal government's consent to suit are not the same as those which may favor the broadening of judge-made rules conferring individual personal immunity. Moreover, as will be seen hereafter, the doctrinal development of the two issues since 1949 has diverged completely. The post-1949 statutory interpretation of the Federal Tort

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[11] 177 F.2d at 581.

Claims Act is found in *United States v. Brown*, 348 U.S. 110 (1954), and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). These cases essentially preserve the reading of the Act made in *Brooks* and *Feres*. The law of individual personal immunity of federal officers has undergone an entirely separate development in a series of cases beginning in 1959 with *Barr v. Matteo*, 360 U.S. 564 (1959), and *Howard v. Lyons*, 360 U.S. 593 (1959), and culminating with the Court's most recent discussion in *Butz v. Economou*, 438 U.S. 478 (1978). We should look for the solution to the present problem in the personal immunity holdings and not in the interpretations of the Federal Tort Claims Act.

In 1949, when Judge L. Hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but which with the benefit of hindsight, probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms.[12] It was perhaps a fortunate fortuity that the *Gregoire* issue did not reach the Supreme Court for some time. When it did, in *Barr v. Matteo* and *Howard v. Lyons*, only four Justices — Harlan, Frankfurter, Clark and Whittaker — were ready to embrace absolute immunity. Justice Harlan's plurality opinion in *Barr* quoted extensively from Judge L. Hand's *Gregoire* opinion.[13] Chief Justice Warren, and Justices Douglas, Brennan and Stewart dissented. The critical fifth vote in *Barr v. Matteo* was that of Justice Black, who on the authority of *Spalding v. Vilas*, 161 U.S. 483 (1896), was willing to recognize an immunity from liability for libel with regard to communications related to matters committed by law to the defendants' control, and which were neither unauthorized nor plainly beyond the scope of his official business.[14] Thus *Barr v. Matteo* neither accepted nor definitvely rejected Judge L. Hand's position that federal officials were absolutely immune from liability even for intentional torts. There is a majority opinion in *Howard v. Lyons*, because Justice Stewart, who dissented in *Barr v. Matteo*, joined a majority in sustaining a plea of absolute privilege as a defense to a defamation action brought against the Commander of the Boston Naval Shipyard for a report he sent to the Massachusetts Congressional delegation, at the direction of the Secretary of the Navy. Obviously, since Justice Stewart joined in the decision, *Howard v. Lyons* cannot be read as recognizing an immunity as absolute as that proposed in *Gregoire*. With respect to the instant appeal, however, the significant point is that the defendant in *Howard v. Lyons* was a military officer, and he was treated for purposes of immunity the same as the civilian defendants in *Barr v. Matteo*. The plaintiffs in *Howard v. Lyons* were civilian employees of the Boston Naval Shipyard, and thus the case does not necessarily dispose of immunity from liability to members of the armed forces. But it does suggest that the military status of the defendant, at least, is not determinative.

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[12] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (legitimizing wholesale internments of Japanese).

[13] 360 U.S. at 571-72.

With other wars and other times intervening, the *Gregoire* rule, which seemed so attractive to four Justices in 1959, began to lose its luster. The war against narcotics traffickers provided the Supreme Court with the next opportunity to speak on the rule. *In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that a complaint seeking only damages from federal officers for injuries resulting from a violation of the fourth amendment stated a cause of action within the subject matter jurisdiction of the district court. Although the district court had held the defendants were absolutely immune, the majority declined to consider the defense of immunity because the Court of Appeals for the Second Circuit had declined to pass upon that question. 403 U.S. at 397-98. Justice Harlan, who twelve years earlier had written for a plurality in *Barr v. Matteo*, now saw the wisdom of recognizing uniform federal standards of liability of federal officers for certain types of official wrongdoing. Citing his opinion in *Barr v. Matteo*, he observed

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[14] 360 U.S. at 576-78.

> But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police misconduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.

403 U.S. at 411. On remand, it was obvious to the Second Circuit that the Supreme Court's tentative flirtation with its *Gregoire* rule of absolute immunity was at an end: charges of intentional misconduct could not be dismissed at the pleading stage on the basis of absolute immunity.[15]

Personal immunity from liability for governmental officials engaging in intentional misconduct next came under pressure with respect to state officials in the context of public resistance to the Vietnam War. By the time *Scheuer v. Rhodes*, 416 U.S. 232 (1974), was decided it had become apparent to the Court that a *Gregoire* type absolute immunity could become a powerful instrument in the suppression of dissent, and was inconsistent with the prevailing consensus about the limits of executive action. Thus a unanimous Court held that even the highest military officer of a state, the governor himself, as commander of the State National Guard, was not absolutely immune from a suit for damages under 42 U.S.C. §1983 for military steps taken in the alleged suppression of student dissent over the Vietnam War. Neither were subordinate officers nor enlisted soldiers found immune. Qualified rather than absolute immunity became the general rule with respect to state non-judicial officials in *Wood v. Strickland*, 420 U.S. 308 (1975).[16] Once it was recognized that a *Gregoire* rule simply was too dangerous for general application to state military officials, it became evident that this concern was equally valid with respect to federal officials.

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[15] *See* Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1339 (2d Cir. 1972) (federal agents were not immune from suit because although arrest was within outer perimeters of duty, agents were not performing discretionary function).

By the time *Scheuer v. Rhodes* and *Wood v. Strickland* had been decided, a major obstacle to holding federal officials accountable for damages caused by their intentional wrongdoing had been eliminated. That obstacle arose from the misplaced belief in the years following *Erie R. Co. v. Tompkins*,[17] that state law was the only source for common law tort remedies. If that belief were so, federal officials, responsible to a national rather than a local constituency, might nevertheless be subjected to various standards of liability for their conduct from state to state. Therefore, it was urged, their conduct should be immune. The Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), perhaps influenced by Judge Friendly,[18] effectively disposed of that red herring by recognizing that federal judges were as capable of developing uniform federal common law standards as were their state court counterparts. With the myth of non-uniformity removed from the discussion, it was probably inevitable that the Court would, first in *Doe v. McMillan,* 412 U.S. 306 (1973), with respect to lower level federal officials, and then in *Butz v. Economou,* 438 U.S. 478 (1978), with respect to cabinet officers, finally and unequivocally reject the *Gregoire* rule of absolute immunity for intentional torts. And, as Justice White noted in *Butz*, although the *Bivens* opinion put aside the immunity question, the Court, "could not have contemplated that immunity would be absolute." 438 U.S. at 505. Thus *Gregoire* was implicitly rejected. Justice White went on to announce political truths which should have been truisms, even in 1949, in a democratic society based on principles of individual integrity and freedom:

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[16] *Cf.* Stump v. Sparkman, 435 U.S. 349 (1978) (judicial officer acting within his jurisdiction is immune from damage suit); Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor, as quasi-judicial officer, is immune from civil damage suit).

[17] 304 U.S. 64 (1938).

[18] Friendly, *In Praise of Erie-And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964).

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects — including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
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> > "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee,* 106 U.S., at 220.
>
> See also *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Scheuer v. Rhodes,* 416 U.S., at 239-240. In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

438 U.S. at 505-06.

If the charges in the complaint are true, the defendant officials responsible for the activity complained of clearly fit within the description of officials who have directed their subordinates to undertake infringements of liberty. These officials are charged with having directed, without legal authority, a massive experiment in subjecting soldiers to radiation. Certainly the generally applicable federal law of official immunity announced in *Butz v. Economou* would not provide absolute immunity for these defendants.

The revolution in official immunity doctrine from *Barr v. Matteo* through *Butz v. Economou* was a return to first principles of the common law tradition of accountability. There was never a time, except during the fortunately short influence of *Gregoire v. Biddle*, in which government officials were exempt from the obligation to account for their conduct in a court of law. The military was never an exception. As early as 1804 in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Court held the Commander of a United States warship liable for damages for an unlawful seizure of a neutral vessel even though he acted upon instructions of the President of the United States. Chief Justice Marshall's words in that case suggest the proper relationship between the rule of law and the necessity for a military establishment in a democracy:

> I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think, that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think, that where, in consequence of orders from the legitimate authority, a vessel is seized, with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

6 U.S. at 179. Thus from the beginning our law refused to recognize the macho principle of which the opinion of

the court makes so much. The question was presented again in *Bates v. Clark*, 95 U.S. 204 (1877), in which the Supreme Court held an army captain liable in damages for confiscating plaintiffs' liquor, despite a plea of official immunity for action taken in enforcing the ban on alcohol in Indian Territory. Justice Miller wrote:

> It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority. The authority of the commandant of the post in the case was precisely the same as the Indian agent or sub-agent, or superintendent; and it will hardly be maintained that if either of them, wholly mistaking their powers, had seized the goods, he would have incurred no liability.
>
> So the plea that they had good reason to believe that this was Indian country, and that they acted in good faith, while it might excuse these officers from punitory damages, is no defence to the action. If it had been Indian country, and it had turned out that the plaintiffs had a license, or did not intend to sell or introduce the goods, the fact that defendants acted on reasonable ground would have exempted them from liability.
>
> But the objection fatal to all this class of defences is that in that locality they were utterly without any authority in the premises; and their honest belief that they had is no defence in their case more than in any other, where a party mistaking his rights commits a trespass by forcibly seizing and taking away another man's property.

95 U.S. at 209. *Little v. Barreme*, *Bates v. Clark* and *Howard v. Lyons* establish unequivocally that the mili-

tary status of the defendants or the military nature of their duties confers on them no immunity different in kind from that of other government officials. The macho principle has never been a feature of our law. Thus to the extent that the majority opinion relies on the necessity for aggressive exercise of military decisionmaking as a reason for its holding, it has strayed far outside the limits of traditional American thinking about the appropriate role of the military in our government. If the weak infant republic could in the interest of accountability reject the macho principle when faced with the perils of the Napoleonic wars, the reason for adopting it in a mature and powerful republic escapes me.

It remains to explore whether the fact that the alleged victims were members of the armed forces would significantly alter the federal law on immunity otherwise applicable. That question involves reliance, in the majority opinion, on the serviceman as automaton principle. For our exploration we may return once again to our November 1949 starting place in the Second Circuit. In *Feres*, Judge A. Hand treated the Federal Tort Claims Act issue as a matter of statutory interpretation, and grounded his interpretation primarily on the fact that other federal statutes provided compensation to some extent without regard to fault.[19] Since Mrs. Feres had not sued the allegedly negligent officers individually, Judge A. Hand had no occasion to and did not discuss whether they could be sued.[20] *Feres* should be contrasted with *Gregoire*, where the complaint charged an intentional tort of false arrest to which by definition the Federal Tort Claims Act in 1949 did not apply.[21] Judge L.

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[19] 177 F.2d at 537-38.

[20] *See id.*

[21] *Compare* Tort Claims Procedure Act, ch. 646, §2680(h), 62 Stat. 982, 985 (1948) (exempting intentional torts from FTCA) *with* 28 U.S.C. §2680(h) (1976) (making exceptions to the exception for intentional torts). *See generally* Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 497 (1976).

Hand was dealing with the entirely separate and nonstatutory issue of whether federal officials, sued individually, were absolutely immune from civil liability under either state or federal law as a consequence of a judicially created rule of federal common law. When *Feres* arrived in the Supreme Court, however, Justice Jackson's opinion included language which has since tended to becloud the distinction between the *Feres* and *Gregoire* issues. He noted that the Federal Tort Claims Act imposed liability on the "United States . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." 340 U.S. at 141 (quoting 28 U.S.C. §2674). This was, of course, a reference to the application of state tort laws, and it precluded the approach, later adopted by the Court in *Bivens*, of a uniform federal rule applicable to plaintiffs and defendants regardless of the situs of the accident. Justice Jackson assumed that Congress would not desire the imposition of such potentially diverse legal standards in the distinctly federal relationship of the government and members of its armed forces. 340 U.S. at 143. That reason for construing the Federal Torts Claims Act as inapplicable to soldiers, whatever its weight, still applies, since the statute by its terms adopts state law standards of liability. But since the decision in *Bivens*, that reason is wholly inapplicable to suits against individual federal officers since the federal courts are free to fashion a uniform federal common law. Thus the problem of nonuniformity to which the opinion refers is not present in the case before us, at least insofar as the majority discussion of a federal common law remedy is involved.

Justice Jackson, however, advanced another reason for placing the military outside the coverage of the Act. Noting the reference to state law, he observed:

> One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which

> they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover *for negligence*, against either his superior officers or the Government he is serving.[10] Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.
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> 10. *Cf. Dinsman v. Wilkes*, 12 How. 390, and *Weaver v. Ward*, Hobart 135, 80 Eng. Rep. 284 (1616), as to intentional torts.

340 U.S. at 141-42 (emphasis added). The quoted passage is the source for the later confusion as to the existence of a separate doctrine of absolute immunity of military officers from suits by members of the armed forces. It is quite clear, however, that there never was such absolute immunity, and that Justice Jackson never intended to suggest that there was. Indeed, such a suggestion coming from a Justice recently returned from acting as prosecutor in the Nuremberg Trials, where he had seen ample evidence of the need to make the military responsive to basic principles of personal integrity, would have been quite surprising. Jackson stated only that there he knew of no intra-military state law of negligence.[22]

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[22] According to the leading commentator on military law, Justice Jackson was poorly informed even about intra-military negligence actions:

> Where in the performance of duty, an officer or soldier, unintentionally but through negligence, does any considerable injury to another officer or soldier, or to his property, the latter has his action for damages against the former in the same manner as would a civilian. Thus where a soldier, on skirmish drill, so negligently discharged his musket as to wound another soldier, he was adjudged liable for damages in a suit instituted on account of the injury.[36]
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> 36. Weaver v. Ward, Hobart 134.

W. Winthrop, *Military Law and Precedents* 885 (2d ed. 1920). This treatise, recognized throughout the English-speaking world as au-

Moreover, in the same sentence, he makes a footnote reference to cases recognizing the liability of military officers for intentional torts. *Dinsman v. Wilkes*, 53 U.S. (12 How.) 389 (1851), to which Justice Jackson refers in *Feres*, is important in two respects. First, it is closely analogous, factually, to the dispute before us. Second, it was relied upon by Justice White in the opinion of the Court in *Butz v. Economou*, 438 U.S. at 492.[23]

In 1836 Congress directed the Navy to undertake what was for that age an enormous and important scientific enterprise: a surveying and exploring expedition of the Pacific Ocean and the South Seas.[24] At the time of the expedition involved in *Dinsman*, the law provided that if the term of enlistment of a navy seaman expired

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NOTE 22 — *(Continued)*

thoritative, also collects over 30 decisions in which servicemen sued their superiors for the intentional torts of libel, malicious prosecution, false imprisonment, and other service related injuries. Id. 880-85. The cases cited establish that at best military officers may have a defense of lack of malice respecting actions within the scope of their actual authority, analogous to the so-called qualified immunity of federal officials. An American case on intentional torts which Justice Jackson might have added to his footnote reference to *Dinsman v. Wilkes* is *Maurice v. Worden*, 54 Md. 233 (1880), in which a professor at the United States Naval Academy sued his superior officers for libel in state court and which rejected the defense of absolute immunity. Except for those lower federal court cases which hold, in mistaken reliance on what in *Feres* is not even dicta, that there is absolute intra-military immunity for willful torts, see note 29 *infra*, no American authority has to my knowledge ever reached that result. Moreover, Justice Jackson cites no authority in *Feres* for absolute immunity even from negligence actions, but merely disclaims knowledge of them. The briefs for the defendants cite no pre-*Feres* authority recognizing absolute immunity even in negligence cases, and my independent research has not discovered any. Since the parties to lawsuits are not ordinarily identified by occupation there is no feasible method for determining how often intra-military lawsuits of any kind have been entertained.

[23] *See* Wilkes v. Dinsman, 48 U.S. (7 How.) 88 (1849) (earlier appeal of same case).

[24] Act of May 14, 1836, ch. 61, 5 Stat. 27.

while the vessel on which he served was in foreign service, the commanding officer was obliged to send him to the United States in some public or other vessel unless his detention was essential to the public interest.[25] Dinsman, a marine serving in the exploring expedition on board the vessel Vincinnes, contended in 1840 that his enlistment was over and that he should be put on board a returning vessel. Captain Wilkes, the commanding officer, declined. He contended that the enlistment had been lawfully extended, and when Dinsman refused to render service, Wilkes ordered him flogged. Dinsman continued to demand that he be returned, and was flogged and locked in the brig on more than one occasion. When the vessel called at Oahu, Hawaii, for repairs, he was lodged in a local and allegedly dismal lock-up. Upon his return to the United States, Dinsman sued Wilkes in trespass *vi et armis* for assault and battery and false imprisonment, alleging, among other things, that he had been subjected to cruel and unusual punishment in violation of the eighth amendment, and that his detention and punishment on Wilkes' orders were without legal justification.[26] A jury in the circuit court in the District of Columbia returned a verdict in Dinsman's favor. The Supreme Court reversed on a writ of error because the trial court's charge was too favorable to the plaintiff. *Wilkes v. Dinsman*, 48 U.S. (7 How.) 88 (1849). Justice Woodbury noted, however, that while there was a presumption of regularity with respect to the imposition of military discipline, there was no absolute immunity from liability for intentional torts. He observed:

> It is not to be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity and energy, is to be protected under mere errors of judgment in

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[25] Act of March 2, 1837, ch. 21, §2, 5 Stat. 153.

[26] *See Wilkes v. Dinsman*, 48 U.S. (7 How.) at 114.

> the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.
>
> The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office.

48 U.S. at 122. A new trial followed. This time the jury verdict favored Wilkes, but on writ of error the Supreme Court again reversed and ordered a third trial because of errors in the admission and exclusion of evidence. *Dinsman v. Wilkes,* 53 U.S. (12 How.) 389 (1851). The reasons for reversal in each case are not particularly relevant for our purposes. What is relevant is that both cases make it abundantly clear that a member of the armed service is not absolutely immune from suit by another member for a willful tort,[27] although he may be entitled to a charge suggesting some degree of qualified immunity, which must be determined at trial.

Justice Jackson very carefully distinguished in *Feres* between the action on the case for negligence[28] and an intentional tort.[29] His *Feres* opinion simply cannot be read, as the district court and others read it, to suggest absolute intra-military immunity from liability for intentional torts.[30] Moreover, no post-*Feres* opinion of the Supreme Court suggests the existence of any separate category of absolute intra-military immunity. And in *Butz v. Economou*, Justice White states explicitly and unequivocally that *Wilkes v. Dinsman* was not overruled by *Spalding v. Vilas*.[31] The immunity of military superiors is the same as, but no more than, the qualified immunity afforded to other members of the executive branch. That conclusion has been clear from *Little v. Barreme* in 1804 through *Wilkes v. Dinsman* in 1849 and *Bates v. Clark* in 1877 and *Howard v. Lyons* in 1959 to *Butz v. Economou* in 1978. In that line of authorities, *Wilkes v. Dinsman* also negates use of the serviceman as automaton principle relied on in the opinion of the court.

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[27] *See* Weaver v. Ward, 80 Eng. Rep. 284 (1616); Fraser v. Balfour, 87 L.J.K.B. 1116 (H.L. 1918).

[28] The *Feres* doctrine has been applied to cases alleging state law negligence. *See, e.g.,* Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976) (*en banc*), *cert. denied,* 430 U.S. 920 (1977) (applying FTCA); Baily v. DeQuevedo, 375 F.2d 72 (3d Cir.), *cert. denied,* 389 U.S. 923 (1967). We need not here repeat the reasons why those cases were erroneously decided.

[29] Several courts have without reference to the distinction made by Justice Jackson extended *Feres* to intentional torts brought under the FTCA. *See* Citizens Nat'l Bank of Waukegan v. United States, 594 F.2d 1154 (7th Cir. 1979); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), *aff'd on district court opinion,* 455 F.2d 992 (2d Cir. 1972).

There is, moreover, statutory authority plainly undercutting the majority's serviceman as automaton rationale for its decision. The policy of American military law is not to encourage blind obedience by discouraging complaints of official misconduct. It is just the opposite. It is embodied, moreover, not in the statutes dealing with veterans benefits, which by no stretch of the most fevered imagination can be construed to have anything to do with military discipline, but in the statute in which Congress dealt directly with that subject. The Uniform Code of Military Justice and its predecessors — the Articles of War and the Articles for the Government of the Navy — far from discouraging complaints of wrongs committed by military superiors, affirmatively encourage them. 10 U.S.C. §§938, 939.[32] That policy has been part of our military law since at least 1806.[33] Moreover, lest it be thought that such complaints are a matter for intra-military concern only, it is settled that results of such complaints are judicially reviewable. *E.g.*, *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973); *Cortright v. Resor*, 447 F.2d 245 (2d Cir.), *cert. denied*, 405 U.S. 965 (1972). Since throughout our military history a policy of encouraging complaints of wrongs by military superiors has been codified in those statutes enacted by Congress pursuant to its constitutional authority to "make Rules for the Government and Regulation of the land and naval forces,"[34] it requires a considerable judicial impudence to announce that permitting complaints in a court of law would be injurious to the discipline of the armed forces. Our armed services have served the republic reasonably well under a policy which encourages complaints and requires redress of wrongs.

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[30] *But cf.* Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (intra-military immunity for intentional tort while on active duty, but no such immunity for post-discharge negligence or damage action under fifth amendment).

[31] *Butz v. Economou*, 438 U.S. at 493-94.

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[32] §938. Art. 138. Complaints of Wrongs

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

§939. Art. 139. Redress of injuries to property

(a) Whenever complaint is made to any commanding officer that wilful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time of damages complained of were inflicted, as determined by the approved findings of the board.

[33] Articles of War of 1806, ch. 20, §§34, 35, 2 Stat. 359, 364 (1806). *See* letter of C. A. Rodney, Attorney General, to Hon. P. Hamilton, 1 Op. Atty. Gen. 166 (1811).

Scheuer v. Rhodes is the complete answer to the majority's reliance on the macho principle as a justification for absolute immunity, for that principle is equally applicable to suits by civilians, which that case permits. The ancient complaint procedures embodied in the Uniform Code of Military Justice afford a complete answer to the majority's reliance on the serviceman as automaton principle, since our statutory military policy encourages complaints about and redress of intra-military wrongs. The two policy reasons advanced in support of a military necessity rationale have been rejected by the policymakers whose policy judgments should be accepted by this court.

Thus when the majority announces an intra-military immunity so broad as to deprive every court in the land of jurisdiction to hear a claim for relief for the commission of a willful tort, it explores new territory and invents new doctrines unwarranted by our historical experience. Nonetheless the defendants urge, and the majority judges apparently believe, that sound policy compels such invention. It is contended by defendants that if military superiors could be sued for the intentional infliction of harm, the result would be that federal judges would exercise judicial review over their decisions. This is urged as an unthinkable proposition. It was not unthinkable to the Supreme Court in the *Dinsman* case. The opinions in that case disclose that Captain Wilkes was tried by a navy court martial for his conduct during the Exploring Expedition and found not guilty. He urged throughout that the favorable outcome of the court martial precluded the imposition of personal liability. The Court held to the contrary; the outcome was not even admissible into evidence. *Dinsman v. Wilkes*, 53 U.S. at 405. Even the existence of a separate system of military justice did not preclude accountability in a civil action in a court of law.

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[34] U.S. Const. art I. §8. ch. 14.

Faced with the decision in *Wilkes v. Dinsman*, Congress has had over one hundred thirty years to react to it legislatively in the exercise of its power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, §8, cl. 14. It has never chosen to confer absolute immunity. Instead, in keeping with a long historical tradition,[35] it has done no more than provide for removal of such suits to a federal forum. The presently applicable statute is 28 U.S.C. §1442a (1976), which is derived from Section 9 of the Uniform Code of Military Justice.[36] Section 9 in turn was based on the Articles of War.[37] Certainly, Congress is in a better position than we are to judge whether protection oth-

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[35] The long historical tradition of balancing the needs of federal supremacy against the democratic value of executive branch accountability, by legislating not for immunity but for removal and trial in a federal forum, commenced in 1815 when Congress, prompted by New England's resistance to the War of 1812, provided for removal to federal courts of suits over customs duties. Act of February 4, 1815, §8, 3 Stat. 195, 198-199. It thus preserved the common law remedy of assumpsit against the collectors of customs for overassessments, *see, e.g., Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836), rather than clothing executive officers with absolute immunity. When South Carolina responded to the Tariff Act of July 14, 1832, by passing the South Carolina Ordinance of Nullification, 1 Stat. (S.C.) 329 (Nov. 24, 1832), which directed the courts of that state to resist enforcement of the federal act, Congress again reacted not by conferring absolute immunity but by providing for removal to a federal forum. Act of March 2, 1833, 4 Stat. 632, 633-34 (current version at 28 U.S.C. §1442a (1976)). When nullification evolved to secession, the issue of liability of military officers

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NOTE 35 — *(Continued)*
became acute. Congress again chose removal rather than immunity. Act of March 3, 1863, ch. 81, §5, 12 Stat. 756-57, *as amended*, Act of May 11, 1866, ch. 80, §§3-4, 14 Stat. 46. The removal protection was extended to members of the armed forces when sued "on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting military forces thereof, or under the law of war." Act of Aug. 29, 1916, §3, Art. 117, 39 Stat. 619, 669. The underlying assumption was, of course, that the officers were subject to suit. It was only during the Civil War that officers were provided with a *defense* — not an immunity — where their actions were pursuant to an order issued by the President or the Secretary of War.

> [A]ny order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue.

Act of March 3, 1863, ch. 81, §4, 12 Stat. 755, 756 (1863). This was the first and last time that this defense was provided to military personnel. The defense "expired by its own limitation." The Mayor v. Cooper, 73 U.S. (Wall) 247, 254 (1867). As noted in the text, the removal protection found its way into the Articles of War. There has been no instance since the expiration of the Civil War that has prompted Congress to pass a similar statute which would provide for a defense based on obedience to orders. Only the removal protection remains.

[36] Act of May 5, 1950, ch. 169, §9, 64 Stat. 107, 146 (1950).

[37] Act of June 4, 1920, ch. 227, art. 117, 41 Stat. 759, 811, *as amended*, June 24, 1948, ch. 625, §242, 62 Stat. 604, 642; *see also* Act of March 3, 1911, ch. 231, §31, 36 Stat. 1087, 1096.

er than removal to a federal forum is necessary for the government of the armed forces.[38]

It is now settled, I had hoped beyond dispute, that even the very decisions of that separate system of military justice are subject to some form of judicial review in the Article III courts.[39] The issue is not availability of judicial review over actions by the military departments of the executive branch, but the appropriate limits of such review. Those limits are found in the holdings in *Butz v. Economou, Scheuer v. Rhodes, and Wood v. Strickland*, which requires that a charge be given which recognizes a qualified rather than an absolute immunity.

The only viable policy ground supporting the opinion of the court is the cover up principle. Denying servicemen access to the courts of law for wrongs committed by their superiors will have the inevitable effect, in a closed society like the military, of encouraging concealment, while the availability of such access even when infrequently used will tend to encourage disclosure and accountability. It is unfortunately the case that even democratic governments must have military establishments in order to maintain effective sovereignty. There are, however, numerous examples of governments democratic in form but totalitarian in fact, because, unlike the United States, their military establishments have become the embodiment of the national sovereignty rather than the controlled means whereby democratically chosen civilians may rule. We have been spared that unhappy state in large part because we have always insisted that the military cannot conceal its activities from review by civil authority. The courts have played a significant role in maintaining civil control. A decision which eliminates an important means of access to the courts — a means which in some cases may be the last resort in face of efforts at concealment — is a major assault upon an important citadel of American democracy: military accountability to civil government. The decision embodies a public policy that is affirmatively evil. Rather than a "special factor counselling hesitation", the military status of the victims and the perpetrators is a special factor calling for vigilance.

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[38] Judicial immunity presents an entirely different issue. In that case a judge-made rule on a subject — presumably within the area of expertise of the judiciary — has been acquiesced to by Congress, possibly because of separation of powers considerations in the sensitive area of judicial independence.

[39] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) (habeas corpus review of court martial); Parisi v. Davidson, 405 U.S. 34 (1972); O'Callahan v. Parker, 395 U.S. 258 (1969); Fowler v. Wilkinson 353 U.S. 583 (1957); Burns v. Wilson, 346 U.S. 137 (1953). *Cf.* Schlesinger v. Councilman, 420 U.S. 738 (1975) (servicemen must exhaust military remedies before resorting to remedies available in an Article III court).

A United States Army Colonel, JAGC, commented:

> With its decisions in the 1970's, however, it appears the Court has finally removed any doubt that it will entertain the full range of constitutional challenges to military administrative activities. As the *Levy* case demonstrates, some accommodation to the special characteristics and requirements of the military may still be made on the merits of the case, so the ultimate disposition of a particular case may not be the same as in a purely civilian case. But at least there is no longer any restrictions on the nature of the constitutional challenges which are eligible for review.

Peck, *The Justices and Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1, 65 (1975).

III

In Part I of his opinion Judge Adams disassociates himself from the holding in the opinion of the court that the Supreme Court's immunity decisions supply "special factors counselling hesitation" in recognizing a federal common law cause of action for involuntary human experimentation on servicemen. For the reasons set forth in Part II of this opinion, his disassociation is sound. Nevertheless he, too, joins the majority's foregone conclusion that government officials, military and civilian, charged with conducting that experimentation will not be held accountable in a federal court of law. His route to that result, unfortunately, is no more candid in its treatment of the materials relied upon than the opinion of the court. He acknowledges that the governing standard for recognizing a cause of action against federal officials under the federal common law for constitutional violations, in the absence of a statute conferring it, is that announced in *Carlson v. Green*, 446 U.S. 14 (1980). That case holds that such a federal common law cause of action is presumptively available except in two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396 [*Bivens*]; *Davis v. Passman*, 442 U.S. 228, 245 (1979). The second is when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens, supra*, at 397; *Davis v. Passman*, 442 U.S. at 245-47.

446 U.S. at 18-19. Judge Adams concedes that the case does not fall within the first exception despite the labored effort of the opinion of the court. He then undertakes a search for a statute in which Congress has provided an alternative remedy as a substitute for recovery for intra-military intentional torts. He cannot find one in Title 10 of the United States Code, in which Congress has exercised its power to make rules for the governance of the military, and turns in desperation to the veterans benefit legislation — 38 U.S.C. Nowhere in the latter can he find a place in which Congress "explicitly declared" that the benefits provided be viewed as equally effective as an action for money damages. Thus he is compelled, in order to reach the agreed upon foregone conclusion, to rewrite both *Carlson v. Green* and Title 38 of the United States Code.

To remove from the *Carlson v. Green* standard the requirement of an explicit declaration preempting suits for money damages he reasons that Congress could not have made such an explicit declaration because the last Veterans Benefit Act was passed in 1958, thirteen years before the Supreme court decided *Bivens*. This reasoning is disingenuous. In the first place, money damages could be recovered under state tort law for intentional and negligent torts in 1958. Thus despite the confusion about federal common law which reigned between 1938 when *Erie v. Tompkins*, was announced and 1971, when *Bivens* restored a semblance of rationality, Congress had to be well aware in 1958 of the possibility of actions for money damages in the state courts. An intention by Congress to foreclose a federal common law remedy for money damages while leaving open the possibility of suits in state courts would be irrational. If it wanted to cut off state remedies, it could in 1958 have made the explicit declaration which *Carlson v. Green* requires. Thus the time of enactment of the veterans benefit legislation can be no basis for this intermediate court to find that requirement satisfied. Moreover, Judge Adams' reasoning ignores the patent reality that in every Congress since 1971 the level of veterans benefit legislation has been considered, either in the appropriation process or otherwise. Indeed the speciousness of his reasoning is demonstrated internally in the concurring opinion, which relies, in finding a Congressional intention to eliminate third party money damage claims, upon a snippet of the legislative history of the Veterans and Survivors Pension Adjustment of 1976.[40] That legislation, surely, presented Congress with a post-*Bivens* opportunity to make the explicit declaration which *Carlson v. Green* requires.

Judge Adams cannot find in Title 38 any indication whatever that Congress dealt with the subject matter of tort actions against third parties by veterans or their families. He turns to the extensive legislative history of that title. The first veterans benefit statute was enacted on September 29, 1789,[41] and at no time since have we been without such legislation. Searching 182 years of legislative history for the slightest hint of an expression which can be tortured into a Congressional intention arguably satisfying *Carlson v. Green*, the opinion relies on a 1976 statement, and lifts it completely out of context. Plainly, the statement relied upon — "[t]he [Congress] periodically reviews the service-connected disability compensation program to ensure that authorized benefits provided *reasonable and adequate compensation* for disabled veterans" — Concurring Opinion, Typscript at 10, deals with the problem of inflation, not the problem of third party actions.[42] A brief writer would be criticized for taking similar liberties with legislative materials.

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[40] S. Rep. No. 94-1226, 94th Cong., 2d Sess. 10 (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 2537, 2541.

Further evidence of the illogic of the separate opinion is the effort to bolster the unfair use of legislative history with a citation to *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). Relying on a reference to *Stencel Aero* in *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460 (1980), the opinion, again out of context, uses the quotation: "In *Stencel*, Congress had provided a remedy, which we thought to be exclusive." 444 U.S. at 464. The quoted language cannot refer to any "exclusive remedy" except that against the United States. *Stencel Aero* was a case in which an injured serviceman was pursuing a tort action against a third party, whose claim for indemnity by the United States was rejected. The opinion in that case clearly assumes that third party actions are available to servicemen despite service and veteran benefit programs. The question was not specifically addressed because there was no need to. Both in *Brooks v. United States*, 337 U.S. 49 (1949), and in *United States v. Brown*, 348 U.S. 110 (1954), in service and veterans benefits were available to the plaintiffs, but the Court held that plaintiffs could recover under the Federal Tort Claims Act because third party actions would lie despite that availability. Rather than supporting Judge Adams' attribution of Congressional intention to limit recovery from third parties then, *Stencel Aero* points in a 180 degree different direction. In light of the *Brooks* and *Brown* holdings, the construction of *Hatzlachh* and of the holding in *Stencel Aero* set out in the concurring opinion are utterly unsupportable.

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[41] An Act providing for the Payment of Invalid Pensioners of the United States. 1 Stat. 95.

[42] In context, the statement reads:

> The Committee periodically reviews the service-connected disability compensation program to ensure that authorized benefits provide reasonable and adequate compensation for disabled veterans.
>
> Traditionally, this review of disability compensation and dependency and indemnity compensation (DIC) program has occurred biennially. But continuing inflation in recent years has led to review on an annual basis. The rates were adjusted 2 years ago by the Veterans Disability Compensation and Survivors Benefits Act of 1974 (Public Law 93-295).

Moreover, speaking of employee benefit programs generally, inclusion of an express prohibition on third party actions would be a legal anomaly. Workers' compensation legislation is the civilian analogue to veterans benefits. The federal employee compensation statute limits the liability of the United States. 5 U.S.C. §8116 (1976). But like compensation statutes generally, the federal law permits third party actions, even against fellow employees.[43] Indeed the United States has provided itself by law with a subrogation lien on claims against third parties for injury to servicemen for those expenses it has incurred.[44] The statute expressly preserves third party actions,making no exception for fellow servicemen defendants.[45] In many cases the claims of the United States and of the serviceman have gone forward in the same action.[46] Some of those cases have been against members of the armed forces.[47] Here Congress has spoken explicitly to the question whether its benefit programs should determine the level of recovery, and has said otherwise.

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[43] *See, e.g.*, Bates v. Harp, 573 F.2d 930, 934-36 (6th Cir. 1978); Marion v. United States, 214 F. Supp. 320 (D. Md. 1963). *See also* Annotation, 21 A.L.R. 3d 845, 850-52 and references noted therein.

[44] 42 U.S.C. §2651(a) (1976).

The result which Judge Adams would reach by the legerdemain of rewriting *Carlson v. Green* and Title 38 would produce an even more peculiar set of anomalies. He would apparently permit a *Bivens* type of action in cases where the tort did not produce the kind of permanent injury which qualifies for veterans benefits, but deny it when the tortfeasor caused such injury. Thus if a serviceman received a painful beating — the rubber hose treatment, for example — but recovered, he could sue in federal court, but if the rubber hose knocked out his eye, he could not. Similarly, since dishonorably discharged servicemen are generally barred from receiving benefits, 38 U.S.C. §3103(e)(2), Judge Adams would presumably allow recovery by one discharged after a court martial, but deny recovery to one who had been honorably discharged. No rational Congressman would make such distinctions. Moreover, Judge Adams would, in the event of a permanent injury, permit suit in a state court despite the availability of veterans benefits. This would treat veterans benefits as adequate to foreclose recovery under federal law but inadequate to foreclose such recovery in a suit in a state court. As noted earlier, no rational Congressman would design such a system. This is especially true when the standard of conduct relied upon by the plaintiff is a federal constitutional provision to be applied by the state court because of the Supremacy Clause. The plain fact is that Congress has never, directly or indirectly, expressed an intention to make veterans benefits preemptive of federal or state tort actions. *A fortiori* the availability of such benefits lends no support to the holding of the court that intra-military actions for money damages for intentionsl torts of any kind are not permitted.

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[45] 42 U.S.C. §2652(c) (1976).

[46] *E.g.*, United States v. Haynes, 445 F.2d 907 (5th Cir. 1971) (Government and military dependent who received government benefits sue serviceman who caused injury).

[47] United States v. Neal, 443 F. Supp. 1307 (D. Neb. 1978) (suit by government against soldier for negligence in injuring fellow soldier).

IV

While Judge Adams would remand for further consideration of the state law claims, the opinion of the court holds that those claims are preempted. It is worth noting, however, that aside from their absolute immunity contention, defendants did not urge state law preemption. To the contrary, they told us:

> Plaintiffs' allegations in this case, if true, would undoubtedly show egregious government misconduct, but for all appearances, their claim arises under traditional tort law, not the Constitution.

Appellees' Brief at 26. The same concession was made in the district court. There was no occasion for the plaintiffs to argue that if a federal common law cause of action were rejected, the state law claim ought to be considered. In these circumstances the opinion of the court in *sua sponte* holding state law of intentional torts to be preempted in the military setting is a violation of fundamental principles of appellate due process.

I must concede, however, that since the opinion of the court is in a realistic sense an immunity decision, the result of the preemption discussion is at least logical. If there were absolute intra-military immunity it would apply regardless of the source — federal or state — of the cause of action. But there is no such immunity, and the rationale for rejecting a *Bivens*-type claim is no more satisfactory when applied to the pendent state law claim.

Preemption analysis is appropriate only when two regulatory schemes, state and federal, are in such actual conflict that both cannot stand in the same field, or where Congress has unmistakably preempted the field. *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963). If the majority were correct that there is no federal common law cause of action, then there is no possibility of a conflict between state and federal regulatory schemes. Moreover, it cannot point to any statute by which Congress has unmistakably preempted the state law of intentional torts. The majority's opinion is thus inconsistent with settled preemption rules. The result is sustainable only on immunity grounds, but as noted in Part II, absolute immunity is foreclosed by any fair reading of the governing caselaw.

I would hold that the cause of action is, absent absolute immunity, one arising under federal law. If, as defendants urge, servicemen's claims for constitutional violations causing harm arise under traditional state tort law, most such suits would start in state courts in the absence of complete diversity. Federal military official defendants would udoubtedly exercise the right to remove to a federal tribunal. 28 U.S.C. §§1442(a) (1976). But even in a removed case, since the underlying cause of action arose under state law, the federal tribunal would be obliged to apply the law of the state, including its choice of law. That result would, from the point of view of the federal military establishment, be thoroughly undesirable, for it would prevent the recognition of uniform standards of liability and uniform defenses.

On the other hand, the recognition that the claim arises under the Constitution and laws of the United States means that even if the suit is not removed from a state court the applicable law will be uniform. In the military context, in which residents of many states are brought together, and few have any choice as to location, the need for such uniformity is compelling. A stronger case for federal common law can hardly be imagined.

The opinion of the court certainly achieves uniformity by providing that all courthouse doors are shut for all intentional torts. No civil court may redress unlawful searches and seizures, false imprisonments, or beatings. If a military command tolerates the presence of a Ku Klux Klan Klavern on a post and its members assault blacks or steal their property, the victims are deprived of access to a civil tribunal, which might expose a military cover-up. If female service personnel are raped while on duty, they are deprived of the right to insist that the aggressors respond in damages. If a commanding officer places a sadist in charge of the brig, his victims will be dependent for redress solely upon the chain of command which placed the sadist in charge. That kind of uniformity is purchased at too high a price in any society which treasures human rights. "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. at 506.

V

The majority concludes that the complaint fails to state a claim for relief under either federal or state law, and does not reach other grounds advanced by the defendants. Since I would reverse the district court's dismissal those grounds should be addressed.

A

The defendants urge that the order appealed from should be dismissed because no defendant is subject to service of process by a New Jersey forum. Service was made pursuant to Fed. R. Civ. P. 4(e) and New Jersey Civil Practice Rule 4:4-4(e), which authorize out of state service on nonresident defendants subject to due process limitations. Thus defendants can succeed in their personal jurisdiction argument only if we were to conclude that the exercise of adjudicatory authority by a

New Jersey court over this lawsuit would violate due process.[48]

The defendants rely on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). That reliance is misplaced. Jaffee allegedly resided in New Jersey, he was drafted and transported involuntarily to Nevada, he was there subjected to radiation which eventually produced harm in New Jersey. It is in New Jersey that he is being treated for cancer, in New Jersey that he suffers pain, in New Jersey that his wife is being deprived of his services and companionship. It is an extreme reading of the due process clause to require Jaffee to follow the defendants to the several states in which they now reside. The military circumstances of the case highlight the potential burdens for such plaintiffs and the need for uniform standards.

The district court did not fully develop its jurisdictional analysis and did not have the benefit of the recent Supreme Court decision in *World-Wide Volkswagen Corp. v. Woodson*, *supra*, which deals with due process limitations on state long-arm *in personam* jurisdiction. The federalism concerns which appear to have motivated the *World-Wide Volkswagen Corp.* majority, 444 U.S. at 293-94, probably do not apply here since it is unlikely that any state's law could have controlled defendants' conduct or that any state would be interested in protecting defendants from liability for constitutional torts. But since the district court did not consider the matter in detail, I would affirm its judgment without prejudice to a reconsideration of the personal jurisdiction issue upon a proper motion. If the district court concludes that there is no personal jurisdiction, that fact alone would not preclude its authority to transfer the case for venue reasons under 28 U.S.C. §1406(a) (1976). *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962); *Schwilm v. Holbrook*, —— F.2d —— (3d Cir. No. 81-1357, 1981).

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[48] *Cf.* Grove Press, Inc. v. CIA, 76 Civ. 5509 (VLB) (S.D.N.Y. Jan. 15, 1980) (mem. order) (New York long-arm statute, which reaches nonresidents who commit tortious acts within state, confers personal jurisdiction over CIA officials sued in individual capacity).

B

Finally, defendants urge that the dismissal of the complaint should be affirmed because under 28 U.S.C. §1391(b) (1976) venue did not lie in New Jersey. They contend that for venue purposes the cause of action arose, if at all, only in Nevada. The district court held, I think properly, that the action arose in New Jersey, where the effects of the radiation were first manifested. If plaintiff had not developed cancer he would not be seeking damages. While he was exposed to radiation in Nevada, his cause of action for radiation-induced cancer, which eventually developed when he resided in New Jersey, arose in Nevada only in some metaphysical sense. Clearly there was venue in New Jersey under 28 U.S.C. §1391(e) for Count IV which we considered in *Jaffee I* and to which the claims now before us are intimately related. In any event, the defendants' venue argument is not a reason for affirming the dismissal of the complaint. At most we would have to remand so that the district court could consider a transfer. 28 U.S.C. §1406(a) (1976). *See Brimer v. Levi*, 555 F. 2d 656 (8th Cir. 1977).

VI

It is appropriate to note my complete agreement with Judge Hunter's strong objection to the Courts of Appeals basing their decisions upon prophecies of how the Supreme Court would decide the same case. To his objection I add this observation: what in the opinion of the court apparently is intended as an anticipatory genuflection to our superiors may instead be perceived, on the evidence of *Scheuer v. Rhodes*, as a gratuitous libel. I remind my brethren that in the Sixth Circuit Court of Appeals the majority accepted the same military necessity arguments which they now predict the Supreme Court will accept. Judge Celebrezze, the member of the Sixth Circuit Court of Appeals with actual experience as the Commander-in-Chief of the Ohio National Guard, recognized those arguments as the nonsense they are. *Krause v. Rhodes*, 471 F.2d 430, 447-68 (6th Cir. 1972). It is his view which was adopted by a unanimous Supreme Court. The Court recognized, what Judge Celebrezze knew from his experience in government, that in a democracy we have far more to fear from the lack of military accountability than from the lack of military discipline or aggressiveness. There is no evidence that the Supreme Court has changed its mind.

VII

Years ago, Chief Justice Cockburn, rejecting the contention that military discipline required absolute intra-military immunity from suit, cogently and eloquently observed:

> In substance [the argument] comes to this. It is essential to the efficiency of an army that discipline should be upheld; that obedience to orders however desperate and peremptory should be enforced; that the energy of commanding officers in giving such orders, in cases of trying emergency, and enforcing obedience of orders and observance of discipline . . . should not be crippled by the apprehension of vexatious actions; more especially as juries by whom such actions would have to be decided are incompetent to form a judgment on matters of a military or naval character. . . .
>
> . . . I must say that this reasoning fails to bring conviction to my mind. I cannot bring myself to be-

> lieve that officers in command would hesitate to give orders which a sense of duty required, or to enforce obedience and discipline in the due exercise of authority, from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty, as Eyre, B., expresses it, "fearless of consequences," and would trust to the firmness of judges, and the honesty and good sense of juries to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty. On the other hand, while no man would more strenuously uphold military authority when legitimately exercised, or would more earnestly urge upon juries the propriety of presuming everything in favor of its legitimate exercise, and of requiring the most cogent and conclusive evidence in favor of its abuse to entitle an inferior officer to recover in an action against a superior, I cannot bring myself to think that it is essential to the well-being of our military or naval force, that where authority is intentionally abused for the purpose of injustice or oppression . . . the party injured . . . is to be told that the Queen's Courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint. . . . Neither can I believe that a jury, under the guidance of a judge, may not safely be intrusted with the decision of such questions.

Dawkins v. Lord Paulet, [1869] 5 QB 94, 107-09. I think as highly of the devotion to duty of American military men in 1981 as Lord Cockburn did of British military men in 1869, and I am as confident in our legal system as he was in the British.

I would reverse the order dismissing the complaint.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of the Panel
of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1543

STANLEY JAFFEE AND SHARON BLYNN JAFFEE,
INDIVIDUALLY, *Appellants*
and
STANLEY JAFFEE, on behalf of all
others similarly situated,

v.

UNITED STATES OF AMERICA, ROBERT T. STEVENS, J. LAWTON COLLINS, JOSEPH M. SWING, WILLIAM C. BULLOCK, ROBERT A. LOVETT, HENRY D. SMYTH, T. KEITH GLENNAN, EUGENE M. ZUCKERT, MARION W. BOYER, KENNETH D. NICHOLS, KENNETH E. FIELDS, and Certain Additional Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity, *Appellees*

(D.C. Civ. No. 78-1014)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued November 15, 1979

Before: GIBBONS, HIGGINBOTHAM and SLOVITER,
Circuit Judges

(Opinion Filed February 20, 1980)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This appeal, which involves another aspect of the lawsuit which was before us in *Jaffee v. United States,* 592 F.2d 712 (3d Cir.), *cert. denied,* 99 S.Ct. 2406 (1979) (*Jaffee I*), seeks reversal of an order dismissing a complaint against the individual defendants named therein. The former appeal considered an interlocutory order denying injunctive relief and was reviewable, although it did not dispose of all claims, pursuant to 28 U.S.C. §1292(a) (1976). The order appealed from, in this instance, does not finally dispose of all claims against all parties. In entering the order dismissing the complaint as to individual defendants on the ground of lack of subject matter jurisdiction, the district court determined that there was no just reason for delay in the entry of a final judgment. *See* Fed. R. Civ. P. 54(b). Thus the judgment in favor of the individual defendants is final and reviewable under 28 U.S.C. §1291 (1976). We conclude that the district court erred in entering judgment in favor of the individual defendants at the pleading stage, and we reverse.

I

The amended complaint on which the district court acted was filed by Stanley Jaffee and Sharon Blynn Jaffee, his wife. Jaffee seeks damages for personal injury which resulted from a malignancy allegedly caused by his exposure to radiation. His wife seeks damages for the loss of Jaffe's services, society, consortium and companionship. Both also seek punitive damages.

The Jaffees charge that in the spring of 1953, while Jaffee was serving on active duty with the United States Army at Camp Desert Rock, Nevada, he and other soldiers were ordered to stand in an open field near the site of an explosion of a nuclear bomb without any protection against radiation; that the explosion of that bomb exposed Jaffee and others to massive doses of radiation; that the government officials responsible for ordering the explosion and the attendance of the soldiers at the site knew that they were exposing those soldiers to grave risk of injury and death from the resultant exposure to radiation; that these officials deliberately and recklessly disregarded this knowledge; that conducting this dangerous involuntary experiment upon the bodies of the servicemen served no legitimate purpose, military or otherwise, and was in excess of the authority of those responsible for it; that the conduct in question caused Jaffee's cancer; and that these actions violated his rights, and those of others so exposed, guaranteed by the First, Fourth, Fifth, Eighth and Ninth Amendments to the Constitution. The defendants named in the complaint are the United States, eleven named individual defendants, who at the time of Jaffee's service were officers or employees of the United States Army, the Department of Defense, or the Atomic Energy Commission, and certain unnamed additional officers alleged to be responsible for his exposure.

In *Jaffee I* we considered a separate count, Count IV of the complaint, which named only the United States as a defendant. *See Jaffee v. United States,* 592 F.2d 712, 714 (3d Cir. 1979). In Count IV, plaintiffs sought notification to and medical treatment for all soldiers who were exposed to radiation in the Camp Desert Rock exercise. We noted that the class action plaintiffs did not rely upon the Federal Tort Claims Act of 1946, 28 U.S.C. §§1346, 2671-80 (1976). Insofar as Count IV sought an order directing the government to provide medical services to class members, we held that it was properly dismissed because there was no waiver of federal sovereign immunity for such compensatory relief. 592 F.2d at 715. We held, however, that the 1976 amendments to section 702 of the Administrative Procedure Act,[1] waived federal soverign immunity with respect to the claim for a mandatory injunction to compel notice to a class of potential cancer victims. 592 F.2d at 718-20. The counts to which we now turn were not before this court in *Jaffee I*, and also do not seek relief under the Federal Tort Claims Act.

The district court, in an opinion expressing grave reluctance to dismiss the complaint against the individual defendants, concluded that *Feres v. United States,* 340 U.S. 135 (1950), compelled that result.[2] The Court observed:

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[1] *See* 5 U.S.C. §702 (1976).

> [A]s I read the law, it doesn't matter if they stood up there and said "one, two three, left, right, left," and marched them over a cliff . . . . You'd be protected under *Feres* . . . .

468 F. Supp. at 635. The immunity of military superiors to suit by members of the armed forces, in the view of the district court, was absolute. We conclude that there is no such absolute immunity.

At the outset, we note that the incidents giving rise to this case did not occur under battle conditions. Thus we have no occasion to consider whether military commanders may be absolutely immune from civil responsibility for acts ordered or performed in such a situation.[3] We emphasize, as we did in *Jaffee I,* that the Jaffees do not rely, either on their own behalf or as a class representative, upon the Federal Tort Claims Act. Thus we have no occasion to consider whether an allegation that governmental officials knew of the risk of ongoing damage from ingested radioactive particles and deliberately or negligently failed to warn Jaffee of the ongoing hazard after Jaffee left military service would state a claim under that statute.[4] There is an allegation that a pre-discharge condition due to exposure may have been aggravated by the post-discharge negligent failure to warn, although Count IV did not plead this theory of recovery under the Federal Tort Claims Act against the United States. *See Jaffee v. United States,* 592 F.2d at 719. Nor is any relief sought under the Federal Tort Claims Act against the United States for the alleged wrongdoing of Jaffee's superiors while he was in service. Thus the holding in *Feres* that the Federal Tort Claims Act will not permit recovery by a soldier against the United States for negligence of a fellow soldier occurring in the course of military service is not controlling. Indeed the complaint does not charge negligence. It charges an intentional tort of human experimentation conducted without authority or military justification, in willful violation of fundamental constitutional rights, and it seeks damages from the individual perpetrators of these wrongs. The district court found support for absolute immunity, even for willful tortious violations of constitutional rights, in *Feres v. United States.* We find no such support, and we conclude that at best the immunity of the individual defendants is qualified.

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[2] The district court opinion is reported at 468 F. Supp. 632 (D.N.J. 1979).

[3] *Cf.* Brooks v. United States, 337 U.S. 49, 51 (1948); 28 U.S.C. §2680(j)(1976)(exception to FTCA).

[4] *See* Henning v. United States, 446 F.2d 774, 778 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016 (1972); Thornwell v. United States, 471 F. Supp. 344, 349 (D.D.C. 1979) (allowing recovery under FTCA for post-discharge negligence); Schwartz v. United States, 230 F. Supp. 536, 540 (E.D. Pa. 1964) (finding negligence under FTCA in failure to warn of the supposedly innocent treatment that endangered plaintiff's health).

II

In October 1949 two interesting cases, which foreshadowed the legal problem presented by this appeal, were before the Court of Appeals for the Second Circuit. One was *Feres v. United States*, 177 F.2d 535, *aff'd* 340 U.S. 135 (1950). The other was *Gregoire v. Biddle,* 177 F.2d 579 (1949), *cert. denied*, 339 U.S. 949 (1950).

In the *Feres* case, the executrix of a deceased soldier sought recovery under the Federal Tort Claims Act against the United States for the death of her husband who had died by fire in military barracks. Negligence was alleged in quartering him in barracks known to be unsafe. Judge A. Hand refused to construe the three-year-old Federal Tort Claims Act to cover injuries suffered while on duty and distinguished the recently decided *Brooks v. United States,*[5] on the ground that *Brooks* involved an injury to an off-duty soldier. As to injuries suffered while on duty, Judge A. Hand found the military pension system to be an exclusive remedy. In the same month, Judge Murrah, writing for the Tenth Circuit in *Griggs v. United States,* 178 F.2d 1 (10th Cir. 1949), *rev'd* 340 U.S. 1135 (1950), reached the opposite conclusion. The Supreme Court resolved the conflict in favor of the Second Circuit view.[6] However, what Justice Jackson's opinion in *Feres* stands for is a matter of some dispute and confusion.

In *Gregoire,* a Frenchman filed a complaint charging that two successive Attorneys-General, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island had conspired to arrest him on the pretense that he was a German enemy alien and had kept him in custody from January 5, 1942 until September 18, 1946, when he was released on a writ of habeas corpus. Gregoire sought from the alleged conspirators money damages. Judge L. Hand, for the court, affirmed a Rule 12(b)(6) dismissal of the complaint on the ground that each defendant, as a high executive branch official, enjoyed absolute immunity even if he acted out of evil motives.[7] Judge L. Hand relied on *Spalding v. Vilas,* 161 U.S. 483 (1896), which recognized official immunity of the Postmaster General, a cabinet officer, against a suit arising out of an official communication. *Gregoire* was not reviewed by the Supreme Court.

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[5] 337 U.S. 49 (1949) (holding that a member of armed forces may recover under FTCA for injuries not incident to his service resulting from the negligence of government employee).

[6] In the *Feres* opinion the Court also considered the case of Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), *affd* 340 U.S. 135 (1950), in which the Fourth Circuit agreed with the Second Circuit *Feres* holding.

[7] Gregoire v. Biddle, 177 F.2d at 581.

In *Feres*, Judge A. Hand was construing a recently enacted statute authorizing the imposition of liability against the United States, and attempting to reconcile it with another statutory scheme for the payment of federal benefits. In *Gregoire*, Judge L. Hand was doing something quite different. He was considerably extending a judicially created immunity doctrine to civil actions against high executive officials. The two tasks are not coextensive, and the reasons that might favor narrow constructions of the federal government's consent to suit are not the same as those which may favor the broadening of judge-made rules conferring individual personal immunity. Moreover, as will be seen hereafter, the doctrinal development of the two issues since 1949 had diverged completely. The post-1949 statutory interpretation of the Federal Tort Claims Act is found in *United States v. Brown,* 348 U.S. 110 (1954), and *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977). These cases essentially preserve the reading of the Act made in *Brooks* and *Feres*. The law of individual personal immunity of federal officers has undergone an entirely separate development in a series of cases beginning in 1959 with *Barr v. Matteo,* 360 U.S. 564, and *Howard v. Lyons,* 360 U.S. 593, and culminating with the Court's most recent discussion in *Butz v. Economou,* 438 U.S. 478 (1978). It is to the personal immunity holdings and not to the interpretations of the Federal Tort Claims Act that we must look for the solution to the present quandary.

In 1949, when Judge L. hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but with the benefit of hindsight probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms.[8] It was perhaps a fortunate fortuity that the *Gregoire* issue did not reach the Supreme Court for some time. When it did, in *Barr v. Matteo,* 360 U.S. 564 (1959), and *Howard v. Lyons,* 360 U.S. 593 (1959), only four Justices, Harlan, Frankfurter, Clark and Whittaker, were ready to embrace absolute immunity. Justice Harlan's plurality opinion quoted extensively from Judge L. Hand's *Gregoire* opinion.[9] Chief Justice Warren, and Justices Douglas, Brennan and Stewart dissented. The critical fifth vote in *Barr v. Matteo* was that of Justice Black, who on the authority of *Spalding v. Vilas,* 161 U.S. 483 (1896), was willing to recognize an immunity from liability for libel with regard to communications related to matters committed by law to the defendants' control, and which were neither unauthorized nor plainly beyond the scope of his official business.[10] Thus *Barr v. Matteo* neither accepted nor definitively rejected Judge L. Hand's position that federal officials were immune from liability even for intentional torts. There is a majority opinion in *Howard v. Lyons,* because Justice Stewart, who dissented in *Barr v. Matteo,* joined a majority in sustaining a plea of absolute privilege as a defense to a defamation action brought against the Commander of the Boston Naval Shipyard for a report he sent to the Massachusetts Congressional delegation, at the direction of the Secretary of the Navy. Obviously, since Justice Stewart joined in it, *Howard v.Lyons* cannot be read as recognizing an immunity as absolute as that proposed in *Gregoire*. For purposes of the instant appeal, however, the significant point is that the defendant in *Howard v. Lyons* was a military officer, and he was treated for purposes of immunity the same as the civilian defendants in *Barr v. Matteo*. The plaintiffs in *Howard v. Lyons* were civilian employees of the Boston Naval Shipyard, and thus the case does not necessarily dispose of immunity from liability to members of the armed forces. But it does suggest that the military status of the defendant, at least, is not determinative.

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[8] *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944) (legitimizing whosesale interments of Japanese).

[9] Barr v. Matteo, 360 U.S. at 571-72.

[10] Barr v. Matteo, 360 U.S. at 576.

With other wars and other times intervening, the *Gregoire* rule, which seemed so attractive to four Justices in 1959, began to lose its luster. The war against narcotics traffickers provided the Supreme Court with the next oportunity to speak on the rule. In *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), the Court held that a complaint seeking money damages from federal officers for injuries resulting from a violation of the fourth amendment stated a cause of action within the subject matter jurisdiction of the district court. The majority declined to consider the defense of immunity because although the district court had held the defendants were absolutely immune, the Court of Appeals for the Second Circuit had declined to pass upon that question, 403 U.S. at 397-98. Justice Harlan, who had written for a plurality in *Barr v. Mateo* twelve years earlier, now saw the wisdom of recognizing uniform federal standards of liability of federal officers for certain types of official wrongdoing. Citing his opinion in *Barr v. Matteo,* he observed:

> But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustifiable sorts of police misconduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.

403 U.S. at 411. On remand, it was obvious to the Second Circuit that the Supreme Court's tentative flirtation

with its *Gregoire* rule of absolute immunity was at an end; charges of intentional misconduct could not be dismissed at the pleading stage on the basis of absolute immunity.[11]

Personal immunity from liability for governmental officials engaging in intentional misconduct next came under pressure with respect to state officials in the context of public resistance to the Vietnam War. By the time *Scheuer v. Rhodes,* 416 U.S. 232 (1974), was decided it had become apparent to the Court that a *Gregoire* type absolute immunity could become a powerful instrument in the suppression of dissent, and was inconsistent with the prevailing consensus about the limits of executive action. Thus a unanimous Court held that even the highest military officer of a state, the governor himself, as Commander of the State National Guard, was not absolutely immune from a suit for damages under 42 U.S.C. §1983 for military steps taken in the alleged suppression of student dissent about the Vietnam War. Qualified rather than absolute immunity became the general rule with respect to state non-judicial officials in *Wood v. Strickland,* 420 U.S. 308 (1975).[12] Once it was recognized that a *Gregoire* rule simply was too dangerous for general application to state officials, it became evident that this concern was equally valid with respect to federal officials. By the time *Scheuer v. Rhodes* and *Wood v. Strickland* had been decided, a major obstacle to holding federal officals accountable for damages caused by their intentional wrongdoing had been eliminated. That obstacle arose from the misplaced belief, in the years following *Erie R.R. Co. v. Tompkins,*[13] that state law was the only source for common law tort remedies. If that were so, there was the prospect that federal officials, responsible to a national rather than a local constituency, might nevertheless be subjected to various standards of liability for their conduct from state to state. Therefore, it was urged, their conduct should be immune. The Court in *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc.*, 403 U.S. 388 (1971), perhaps influenced by Judge Friendly,[14] effectively disposed of that red herring by recognizing that federal judges were as capable of developing uniform federal common law standards as were their state court brothers. With the myth of non-uniformity removed from the discussion it was probably inevitable that the Court would, first in *Doe v. McMillan,* 412 U.S. 306 (1973), with respect to lower level federal officials, and then in *Butz v. Economou,* 438 U.S. 478 (1978), with respect to cabinet officers, finally and unequivocally reject the *Gregoire* rule of absolute immunity for intentional torts. And, as Justice White noted in *Butz,* although the *Bivens* opinion put aside the immunity question, the court, "could not have contemplated that immunity would be absolute." 438 U.S. at 505. Thus *Gregoire* was implicitly rejected. Justice White went on to announce political truths which should have been truisms, even in 1949, in a democratic society based on principles of individual integrity and freedom:

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[11] *See* Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F.2d 1339 (2d Cir. 1972) (federal agents were not immune from suit because although arrest was within outer perimeters of duty, agents were not performing discretionary function).

[12] *Cf.* Stump v. Sparkman, 435 U.S. 349 (1978) (judicial officer acting within his jurisdiction is immune from damage suit); Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor, as quasi-judicial officer, is immune from civil damage suit).

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority pos-

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[13] 304 U.S. 64 (1938).

[14] *In Praise of Erie-And of the New Federal Common Law,* 39 N.Y.U. L. Rev. 383 (1964).

sessed by these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

> "No man in this courntry is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee,* 106 U.S. at 220.

See also *Marbury v. Madison,* 1 Cranch 137 (1803); *Scheuer v. Rhodes,* 416 U.S. at 239-240. In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

438 U.S. at 505-06.

If the charges in the complaint are true, the defendant officials responsible for the activity complained of clearly fit within the description of officials who have directed their subordinates to undertake infringements of liberty. These officials are charged with having directed a massive experiment in subjecting soldiers to radiation without legal authority. Certainly the generally applicable federal law of official immunity announced in *Butz v. Economou* would not provide absolute immunity for these defendants.

It remains to explore whether the fact that the alleged victims were members of the armed forces would significantly alter the federal law on immunity otherwise applicable. For that purpose, we return once again to our November 1949 starting place in the Second Circuit. In *Feres*, Judge A. Hand treated the Federal Tort Claims Act issue as a matter of statutory interpretation, and grounded his interpretation primarily on the fact that other federal statutes provided compensation to some extent without regard to fault.[15] Since Mrs. Feres had not sued the allegedly negligent officers individually, Judge A. Hand had no occasion to and did not discuss whether they could be sued.[16] This should be contrasted with *Gregoire*, where the complaint charged an intentional tort of false arrest to which by definition the Federal Tort Claims Act in 1949 did not apply.[17] Judge L. Hand was dealing with the entirely separate and nonstatutory issue of whether federal officials, sued individually, were absolutely immune from civil liability under either state or federal law as a consequence of a judicially created rule of federal common law. When *Feres* arrived in the Supreme Court, however, Justice Jackson's opinion included language which has since tended to becloud the distinction between the *Feres* and *Gregoire* issues. He noted that the Federal Tort Claims Act imposed liability on the "United States . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." *Feres v. United States,* 340 U.S. at 141 (quoting 28 U.S.C. §2674). This was, of course, a reference to the application of state tort laws, and it precluded the approach, later adopted by the Court in *Bivens,* of a uniform federal rule applicable to plaintiffs and defendants regardless of the situs of the accident. Justice Jackson assumed that Congress would not desire the imposition of such potentially diverse legal standards in the distinctly federal relationship of the government and members of its armed forces. 340 U.S. at 143. That reason for construing the Federal Torts Claims Act as inapplicable to soldiers, whatever its weight, still applies, since the statute by its terms adopts state law standards of liability. But since the decision in *Bivens*, that reason is wholly inapplicable to suits against individual federal officers since the federal courts are free to fashion a uniform federal common law. Thus the problem of nonuniformity to which the opinion refers is not present in the case before us.

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[15] *See* Feres v. United States, 177 F.2d at 537.

[16] *See id.*

[17] *Compare* Tort Claims Procedure Act, ch. 646, §2680(h), 62 Stat. 984 (1948) (exempting intentional torts from FTCA) *with* 28 U.S.C. §2680(h) (1976) (making exceptions to the exception for intentional torts). *See generally* Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497 (1976).

Justice Jackson, however, advanced another reason for placing the military outside the coverage of the Act. Noting the reference to state law, he observed:

> One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover *for negligence,* against either his superior

> officers or the Government he is serving.[10] Nor is is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.
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> 10. *Cf. Dinsman v. Wilkes,* 12 How. 390, and *Weaver v. Ward,* Hobart 135, 80 Eng. Rep. 284 (1616), as to intentional torts.

340 U.S. at 141 (emphasis added). The quoted passage is the source for the later confusion as to the existence of a separate doctrine of absolute immunity of military officers from suits by members of the armed forces. It is quite clear, however, that there never was such absolute immunity, and that Justice Jackson never intended to suggest that there was. Indeed, such a suggestion coming from a Justice recently returned from acting as prosecutor in the *Nuremberg Trials,* where he had seen ample evidence of the need to make the military responsive to basic principles of personal integrity, would have been quite surprising. Jackson stated only that there was no intra-servicemen state law of negligence. Moreover, in the same sentence, he makes a footnote reference to cases recognizing the liability of military officers for intentional torts. *Dinsman v. Wilkes,* 53 U.S. (12 How.) 414 (1851), to which Justice Jackson refers in *Feres,* is important in two respects. First, it is closely analogous, factually, to the dispute before us. Second, it was relied upon by Justice White in the opinion of the Court in *Butz v. Economou,* 438 U.S. at 492.[18]

In 1836 Congress directed the Navy to undertake what was for that age an enormous and important scientific enterprise: a surveying and exploring expedition of the Pacific Ocean and the South Seas.[19] At the time of the expedition involved in *Dinsman*, the law provided that if the term of enlistment of a navy seaman expired while the vessel on which he served was in foreign service, the commanding officer was obliged to send him to the United States in some public or other vessel unless his detention was essential to the public interests.[20] Dinsman, a marine serving in the exploring expedition on board the vessel Vincinnes, contended in 1840 that his enlistment was over and that he should be put on board a returning vessel. Captain Wilkes, the commanding officer, declined; he contended that the enlistment had been lawfully extended, and when Dinsman refused to render service, Wilkes ordered him flogged. Dinsman continued to demand that he be returned, and was flogged and locked in the brig on more than one occasion. When the vessel called at Oahu, Hawaii for repairs, he was lodged in a local and allegedly dismal lock-up. Upon his return to the United States, Dinsman sued Wilkes in trespass *vi et armis* for assault and battery and false imprisonment, alleging, among other things, that he had been subjected to cruel and unusual punishment in violation of the eighth amendment, and that his detention and punishment on Wilkes' orders were without legal justification.[21] A jury in the Circuit Court in the district of Columbia returned a verdict in Dinsman's favor. The Supreme Court reversed on a writ of error because the trial court's charge was too favorable to the plaintiff. *Wilkes v. Dinsman*, 48 U.S. (7 How.) 93 (1849). Justice Woodbury noted, however, that while there was a presumption of regularity with respect to the imposition of military discipline, there was no absolute immunity from liability for intentional torts. He observed:

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[18] *See* Wilkes v. Dinsman, 48 U.S. (7 How.) 93 (1849) (earlier appeal of same case).

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[19] Act of May 14, 1836, ch. 61, 5 Stat. 29.

[20] Act of March 2, 1837, ch. 21, §2, 5 Stat. 153.

[21] *See* Wilkes v. Dinsman, 48 U.S. (7 How.) at 114.

> It is not to be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.
>
> The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office.

48 U.S. at 122. A new trial followed. This time the jury verdict favored Wilkes, but on writ of error, the Supreme Court again reversed and ordered a third trial because of errors in the admission and exclusion of evidence, *Dinsman v. Wilkes,* 53 U.S. (12 How.) 414 (1851). The reasons for reversal in each case are not particularly relevant for our purposes. What is relevant is that both cases make it abundantly clear that a member of the armed service is not absolutely immune from suit by another member for a willful tort,[22] although he may be entitled to a charge suggesting some degree of qualified immunity, which must be determined at trial.

Justice Jackson very carefully distinguished in *Feres* between the action on the case for negligence,[23] and an intentional tort.[24] His *Feres* opinion simply cannot be read, as the district court read it, to suggest absolute intra-military immunity from liability for intentional torts.[25] Moreover, no post-*Feres* opinion of the Supreme Court has been called to our attention suggesting the existence of any separate category of absolute intra-military immunity. And in *Butz v. Economou,* Justice White states explicitly and unequivocally that *Wilkes v. Dinsman* was not overruled by *Spalding v. Vilas.*[26] The immunity of military superiors is the same as, but no more than, the qualified immunity afforded to other members of the executive branch.

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[22] *See* Weaver v. Ward, 80 Eng. Rep. 284 (1616).

[23] The *Feres* doctrine has been applied to cases alleging state law negligence. *See, e.g.*, Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976) (en banc), *cert denied,* 430 U.S. 920 (1977) (applying FTCA); Bailey v. DeQuevedo, 375 F.2d 72 (3d Cir.), *cert. denied,* 389 U.S. 923 (1967).

[24] Several courts have extended *Feres* to intentional torts brought under the FTCA. *See* Citizens Nat'l Bank of Waukegan v. United States, 594 F.2d 1154 (7th Cir. 1979); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), *aff'd on district court opinion,* 455 F.2d 992 (2d Cir. 1972).

Thus if we were to recognize an intra-military immunity so broad as to deprive the district court of jurisdiction to hear a claim for relief for the commission of a willful tort we would be exploring new territory and inventing new doctrines. The United States Attorney, who appears for the defendants, urges that sound policy compels such invention.[27] It is contended that if military superiors could be sued for the intentional infliction of harm, the result would be that federal judges would exercise judicial review over their decisions. This is urged as an unthinkable proposition. It was not unthinkable to the Supreme Court in the *Dinsman* case. The opinions in that case disclose that Captain Wilkes was tried by a navy court martial for his conduct during the Exploring Expedition and found not guilty. He urged throughout that the favorable outcome of the court martial precluded the imposition of personal liability. The Court held to the contrary; the outcome was not even admissible into evidence. *Dinsman v. Wilkes,* 53 U.S. at 431. Even the existence of a separate system of military justice did not preclude accountability in a civil action in a court of law.

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[25] *But cf.* Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (intra-military immunity for intentional tort while on active duty, but no such immunity for post-discharge negligence or damage action under Fifth Amendment).

[26] Butz v. Economou, 438 U.S. at 94.

[27] It was also the United States Attorney who represented Mr. Wilkes in Wilkes v. Dinsman, 48 U.S. (7 How.) at 117.

Faced with the decision in *Wilkes v. Dinsman,* Congress has had over one hundred thirty years to react to it legislatively in the exercise of its power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I §8, cl. 14. It has never chosen to confer absolute immunity. Instead, in keeping with a long historical tradition,[28] it has done no

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[28] The long historical tradition of balancing the needs of federal supremacy against the democratic value of executive branch accountability, by legislating not for immunity but for removal and trial in a federal forum, commenced in 1815 when Congress, prompted by New England's resistance to the War of 1812, provided for removal to federal courts of suits over customs duties. *See* Act of February 4, 1815, §8, 3 Stat. 195, 198. It thus preserved the common law remedy of assumpsit against the collectors of customs for overassessments, *see, e.g., Elliott v. Swartwout,* 35 U.S. (10 Pet.) 137 (1836), rather than clothing executive officers with absolute immunity. When South Carolina in response to the Tariff Act of July 14, 1832, passed the South Carolina Ordinance of Nullification, *see* 1 Stat. (S.C.) 329 (Nov. 24, 1832), which directed the courts of that state to resist enforcement of the federal act, Congress again reacted not by conferring absolute immunity but by providing for removal to a federal forum. *See* Act of March 2, 1833, 4 Stat. 632, 633-34 (current version at 28 U.S.C. §1442(a)(1)(1976). When nullification evolved to seccession, and the issue of liability of military officers became acute, Congress again chose removal rather than immunity. *See* Act of March 3, 1863, ch. 81, §5, 12 Stat. 756, *as amended*, Act of May 11, 1866, ch. 80, §§3-4, 14 Stat. 46. The removal protection was extended to members of the armed forces when sued "on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting military forces thereof, or under the law of war." Act of Aug. 29, 1916, §3, Art. 117, 39 Stat. 619, 669. The underlying assumption was, of course, that the officers were subject to suit. It was only during the Civil War that officers were provided with a *defense*—not an immunity—where their actions were pursuant to an order issued by the President or the Secretary of War.

> [A]ny order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution,

more than provide for removal of such suits to a federal forum. The presently applicable statute is 28 U.S.C. §1442a (1976), which is derived from Section 9 of the Uniform Code of Military Justice.[29] Section 9 in turn was based on the Articles of War.[30] Certainly, Congress is in a better position than we are to judge whether protection other than removal to a federal forum is necessary for the government of the armed forces.[31]

It is now settled, hopefully beyond dispute, that even the very decisions of that separate system of military justice are subject to some form of judicial review in the Article III Courts.[32] The issue is not availability of ju-

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> civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue.

Act of March 3, 1863, ch. 81, §5, 12 Stat. 756. This was the first and last time that this defense was provided to military personnel. The defense "expired by its own limitation." The Mayor v. Cooper, 73 U.S. (Wall) 247, 254 (1867). As noted in the text, the removal protection found its way into the Articles of War. There has been no instance since the expiration of the Civil War that has prompted Congress to pass a similar statute which would provide for a defense based on obedience to orders. Only the removal protection remains.

[29] *See* Act of May 5, 1950, ch. 169, §9, 64 Stat. 146.

[30] *See* Act of June 4, 1920, ch. 227, art. 117, 41 Stat. 811, *as amended,* June 24, 1948, ch. 625, §242, 67 Stat. 642; *see also* Act of March 3, 1911, ch. 231, §31, 36 Stat. 1091.

[31] Judicial immunity presents an entirely different issue. In that case, a judge-made rule on a subject—presumably within the area of expertise of the judiciary—has been acquiesced in by Congress, possibly because of separation of powers considerations in the sensitive area of judicial independence.

[32] *See, e.g.,* Parker v. Levy, 417 U.S. 733 (1974) (habeas corpus review of court martial); Parisi v. Davidson, 405 U.S. 34 (1972); O'Callahan v. Parker, 395 U.S. 258 (1969); Fowler v. Wilkinson, 353 U.S. 583 (1957); Burns v. Wilson, 346 U.S. 137 (1953). *Cf.* Schlesinger v. Councilman, 420 U.S. 738 (1975) (servicemen must exhaust military remedies before resorting to remedies available in an Article III Court).

dicial review over actions by the military departments of the executive branch, but the appropriate limits of such review. Those limits are found in the holdings in *Butz v. Economou, Scheuer v. Rhodes, and Wood v. Strickland,* which require that a charge be given which recognizes a qualified rather than an absolute immunity.

The district court erred, therefore, in holding that there is a federal rule of absolute intra-military immunity from suit which precludes the exercise of subject matter jurisdiction over Counts I, II and III of the amended complaint.

III

The defendants urge that even if we decline to read *Feres* as authority for an absolute intra-military immunity from liability for intentional torts we should nevertheless affirm the dismissal because the complaint fails to state a claim upon which relief can be granted. Conceding that "[p]laintiffs allegations in this case, if true, would undoubtedly show egregious government misconduct", they urge that at best, "their claim arises under traditional tort law, not the Constitution." Appellees' Brief at 26. We are unpersuaded.

In the first place, the defendants' suggestion that the claim arises under "traditional tort law" would refer them to state law. In the absence of complete diversity, that would move the arena of the controversy from the district court to the New Jersey Superior Court, but only temporarily. Federal military official defendants would undoubtedly exercise the right to remove to a federal tribunal, 28 U.S.C. §§1442, 1442a (1976). But even in a removed case, if the underlying cause of action arose under state law the federal tribunal would be obliged to apply the law of the forum, including its choice of law. That result would, from the point of view of the federal military establishment, be thoroughly undesirable for it would prevent the recognition of uniform standards of liability and uniform defenses, regardless of where the events complained of occurred or where the suit was started.

On the other hand, the recognition that the claim arises under the Constitution and laws of the United States means that even if the suit is not removed from a state court the applicable law will be uniform. In the military context, in which residents of many states are brought together, and few have any choice as to location, the need for such uniformity is compelling. A stronger case for federal common law can hardly be imagined. We do not have to decide whether the actions alleged constitute a federal common law intentional tort[33] because the complaint does state a cause of action arising under the Constitution of the United States. *See* 28 U.S.C. §1331(a) (1976).

The plaintiffs allege violations of their First, Fourth, Fifth, Eighth and Ninth Amendment rights. Last term, the Court held that the Fifth Amendment's Due Process Clause could give rise to a cause of action for damages, just as the Fourth Amendment was held to do in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). *See Davis v. Passman,* 47 U.S.L.W. 4643 (U.S. June 5, 1979).[34] This term the Court has been presented with the question of whether a *Bivens*-type remedy may be implied under the Eighth Amendment's prohibition of cruel and unusual punishment. See *Carlson v. Green,*

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[33] *See In re* "Agent Orange" Product Liability Litigation (E.D.N.Y. Nov. 20, 1979) (M.D.L. No. 381), slip op. at 17-24 (damage claim by veterans for injuries suffered in Vietnam War states federal common law cause of action).

[34] *See* Thornwell v. United States, 471 F. Supp. at 353-55 (implying fifth amendment cause of action for injuries suffered by serviceman); Citizens, Savings v. Califano, (D.D.C. Nov. 29, 1979), 48 U.S.L.W. 2386-87 (Dec. 12, 1979) (summary) refusing to imply action because damage—defaulted student loans—was not as egregious as found in *Davis v. Passman). But cf.* Misko v. United States, 453 F. Supp. 513 (D.D.C. 1978), *aff'd mem.* No. 78-1882 (D.C. Cir. Mar. 16, 1979) (refusing to imply fifth amendment damage action in suit by national guardsman alleging negligence).

581 F.2d 669 (7th Cir. 1978), *cert. granted,* 99 S. Ct. 2880 (1979). The Seventh Circuit held that a *Bivens*-type action could be brought by the administratrix of the estate of a deceased federal prisoner because federal common law would allow the survival of such an action. The court also noted that the Federal Tort Claims Act covered negligence and was therefore inapplicable to an intentional tort, which was alleged in that case.

We hold that plaintiffs have stated a cause of action under the Fifth Amendment within the meaning of *Davis v. Passman.* This holding does not preclude the district court on remand from finding a cause of action for other constitutional violations.

We are unpersuaded by the defendants' contention that federal veterans' benefit legislation, 38 U.S.C. §§301-362 (1976), is preemptive. This contention is also somewhat inconsistent with the defendants' argument that the cause of action arises under traditional tort law. They urge that this court in *Jaffee I,* and the Supreme Court in *Stencil Aero Engineering Corp. v. United States,* 431 U.S. 666, 671, 673 (1977), held that military benefit programs are a fully adequate substitute for tort suits. Appellees' Brief at 28. Neither court so held. The cases in question dealt only with what Congress intended in the Federal Tort Claims Act, and the existence of a federal benefit program was thought to bear upon that question.[35] Nothing in the veterans benefit legislation suggests that it was intended by Congress to preempt private remedies against individual defendants, or to overrule *Wilkes v. Dinsman,* or to eliminate from federal law the deterrence which potential personal liability for intentional wrongdoing provides.[36]

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[35] One recent commentator has forcefully argued that "[t]he veterans' program may be appropriate where the rationale for compensation is merely governmental largesse, but is no substitute for congressionally mandated tort recovery [under FTCA]." *See* Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery,* 77 Mich. L. Rev. 1099, 1108 (1979).

IV

The defendants also urge that the order appealed from should be dismissed because no defendant is subject to service or process by a New Jersey forum. Service was made pursuant to Fed. R. Civ. P. 4(e) and New Jersey Civil Practice Rule 4:4-4(e), which authorizes out of state service on nonresident defendants subject to due process of law. Thus defendants can succeed in their personal jurisdiction argument only if we conclude that the exercise of adjudicatory authority by a New Jersey court over this lawsuit would violate due process.[37]

The defendants rely on *Kulko v. California Superior Court,* 436 U.S. 84 (1978), *Shaffer v. Heitner,* 433 U.S. 186 (1977) and *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). That reliance appears to be misplaced. The complaint alleges that Jaffee resided in New Jersey, that he was drafted and transported involuntarily to Nevada, that there he was subjected to radiation which eventually produced harm in New Jersey. It is in New Jersey that he is being treated for cancer, in New Jersey that he suffers pain, in New Jersey that his wife is being deprived of his services and companionship. It would appear to be an extreme reading of the due process clause to require Jaffee to follow the defendants to the several states in which they now reside. The military circumstances of the case highlight the potential burdens for such plaintiffs and the need for uniform standards.

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[36] The existence of a compensatory system (that is arguably inadequate) in no way effectuates the deterrent policy of tort law nor does it prevent "unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." Butz v. Economou, 438 U.S. at 506.

[37] *Cf.* Grove Press, Inc. v. CIA, 76 Civ. 5509 (VLB) (S.D.N.Y. Jan. 15, 1980) (mem. order) (New York long-arm statute, which reaches nonresidents who commit tortious acts within state, confers personal jurisdiction over CIA officials sued in individual capacity).

However, the district court did not fully develop its jurisdictional analysis and did not have the benefit of the recent Supreme Court decision in *World-Wide Volkswagen Corp. v. Woodson,* 48 U.S.L.W. 4079 (Jan. 22, 1980), which deals with due process limitations on state long-arm *in personam* jurisdiction. The federalism concerns which appear to have motivated the *World-Wide Volkswagen Corp.* majority, *see* 48 U.S.L.W. at 4082, probably do not apply to this case since it is unlikely that any state's law could have controlled the conduct complained of, or that any state would be interested in protecting defendants from liability for constitutional torts. But since the district court did not consider the matter in detail, we affirm its judgment without prejudice to reconsideration of the personal jurisdiction issue upon a proper motion filed by one or more of the individual defendants. If the district court concludes that there is no personal jurisdiction, that fact alone would not preclude its authority to transfer the case for venue reasons under 28 U.S.C. §1406(a)(1976). *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463 (1962).

V

Finally, the defendants urge that the dismissal of the complaint should be affirmed because under 28 U.S.C. §1391(b) (1976) venue did not lie in New Jersey. They contend that for venue purposes the cause of action arose, if at all, only in Nevada. The district court held, we think properly, that the action arose in New Jersey, where the effects of the radiation first manifested themselves. It seems clear that if Jaffee had not developed cancer he would not now be seeking damages. While he was exposed to radiation in Nevada, his cause of action for radiation-induced cancer, which eventually developed while he resided in New Jersey, arose in Nevada only in some metaphysical sense. Clearly there was venue in New Jersey under 28 U.S.C. §1391(e) for Count IV which we considered in *Jaffee I,* and arguably section 1391(e) provides for New Jersey venue for the other counts as well.[38] But in any event the defendants' venue argument is not a reason for affirming the dismissal of the complaint. At most we would have to remand so that the district court could consider a transfer to another district. 28 U.S.C. §1406(a) (1976). *See Brimer v. Levi,* 555 F.2d 656 (8th Cir. 1977).

VI

Since we find no authority supporting the district court's holding that there is absolute immunity from intra-military suits for intentional torts, and we reject the defendants' alternative grounds for affirmance, the order dismissing Counts I, II and III of the complaint will be reversed.

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[38] The scope of section 1391(e), and whether it provides for venue in suits against government employees in their individual capacities, is pending before the Supreme Court in Driver v. Helms, 577 F.2d 47 (1st Cir. 1978), *cert. granted, sub. nom,* Colby v. Driver, 439 U.S. 1113 (1979), and Briggs v. Goodwin, 569 F.2d 1 (D.C. Cir. 1971), *cert. granted sub. nom* Stafford v. Briggs, 439 U.S. 1113 (1979). *But see* Blackburn v. Goodwin, No. 78-7529 (2d Cir. Sept. 10, 1979) (§1391(e) does not provide district court with nationwide venue and in personam jurisdiction over U.S. official sued individually).

HIGGINBOTHAM, *Circuit Judge,* Concurring.

I concur in the result. Judge Gibbons has written a scholarly and thoughtful opinion. We are disadvantaged, however, because the Supreme Court has not, since 1851 in *Dinsman v. Wilkes,* 53 U.S. (12 How.) 389 (1851), focused on the type of intentional tort in a military context that is involved in this case. The few casual references to *Dinsman* during the last century do not involve any assessment or analysis of the doctrine which this court today announces. Indeed, the citation of *Dinsman* in *Feres v. United States,* 240 U.S. 135, 141, n. 10 (1950), is ambiguous and at best dictum. But for the *Dinsman* decision I would not join the majority and I would adopt the views stated quite persuasively by Judge Charles R. Richey in *Thornwell v. United States,* 471 F.Supp 344, 347-349 (D.D.C. 1979).

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. The reference to *Dinsman* in Butz v. Economou, 438 U.S. 478, 491-92 (1978), does not indicate that the Court was reflecting on "[t]he peculiar and special relationship of the soldiers to his superiors." United States v. Brown, 348 U.S. 110, 112 (1954). In fact, the discussion of the special requirements of the military in *Brown* and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), suggests that the Supreme Court, if faced with this issue today, might well be inclined to overrule *Dinsman* and grant to the military the immunity which is allowed to judges, *see* Bradley v. Fisher, 13 Wall. 335 (1872), and prosecutors, *see* Imbler v. Pachtman, 424 U.S. 409 (1976).

Opinion of the District Court.

Stanley JAFFEE and Sharon Blinn Jaffee, Individually, and Stanley Jaffee, on behalf of all others similarly situated, Plaintiffs,

v.

UNITED STATES of America and certain past and present Officers and Officials of the United States Department of Defense, the Department of the Army, and the Atomic Energy Commission and the United States Army, whose names will be inserted when ascertained, each individually and in his official capacity, Defendants.

Civ. A. No. 78—1014.

United States District Court, D. New Jersey.

March 29, 1979.

Kreindler & Kreindler, by Steven J. Phillips, New York City and Lanigan, O'Connell, Hirsch & Jacobs by Andrew R. Jacobs, Basking Ridge, N. J., for plaintiffs.

Robert J. Del Tufo, U. S. Atty. by Jerome Simandle, Asst. U. S. Atty., Newark, N. J., and Barbara Allen Babcock, Asst. Atty. Gen. (D. C.) by Mark S. Landman, Bruce E. Titus, Asst. Director, U. S. Dept. of Justice, Washington, D. C., Robert L. Brittigan (D. C.), Major, JAGC Litigation Div., Washington, D. C., for defendants.

STERN, District Judge.

This case presents the question whether the doctrine of intra-military immunity as pronounced by the Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) protects military officers who intentionally violate the constitutional rights of thousands of soldiers. With the gravest reluctance, recognizing that we are bound by the law as it now stands, the Court concludes that *Feres* exempts these defendants from liability.

The United States together with the named defendants, past and present officers of the Department of Army, Department of Defense and the Atomic Energy Commission, are sued directly under the Constitution.[1] It is alleged[2] that these defendants, intentionally and with full knowledge of the consequences of their actions, compelled thousands of soldiers to march into a nuclear explosion at

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[1] The original complaint named only the United States. Because the plaintiff sued the United States directly under the Constitution and not under a specific waiver of immunity, one count of the original complaint was dismissed on the basis of sovereign immunity. The Court, however, agreed to certify the issue for appeal pursuant to 28 U.S.C. § 1292(b). On appeal, the Court of Appeals for the Third Circuit affirmed the judgment except insofar as the complaint sought to compel the United States to warn class members of the health hazards which they faced. With respect to that claim, the court held, there had been a waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.* because review was sought of an agency's "inaction". *See, Jaffee v. United States*, 592 F.2d 712 (3rd Cir., 1979).

[2] We must, of course, accept as true the allegations of the complaint.

Camp Desert Rock, Nevada, in 1953. As a result of his exposure to massive levels of radiation, the named plaintiff has developed cancer of the breast; the class members, it is predicted, face a similar fate. Monetary relief is sought on behalf of Mr. Jaffee and his wife; on behalf of the class, plaintiff seeks to compel the United States to warn the class members to seek immediate medical help.

The individual defendants move to dismiss the complaint on the strength of *Feres*. Because we believe we are bound by that decision, the motion must be granted.

In *Feres v. United States, supra*, the Supreme Court held that the United States is not liable under the Federal Tort Claims Act (FTCA) for injuries incurred by claimants while on active duty in the armed forces.[3] Several reasons were advanced in support of that result. First, since the FTCA makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances", Congress could not have intended to impose liability for acts which have no counterpart in the private sector. Second, the uniquely "federal" nature of the relationship of soldier to the militia, into which the divergent tort laws of the states should not be injected. Third, the enactment by Congress of various uniform death and disability benefits for members of the armed forces and their families, evidencing a Congressional intent that the FTCA was inapplicable to injuries incident to military service.[4] The *Feres* doctrine was recently reaffirmed in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), in which the Supreme Court held that a third party may not seek indemnification against the United States where the victim's injuries are incident to military service.

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[3] Previously, in ***Brooks v. United States***, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) the Court held that a member of the armed services may recover from the United States under the Tort Claims Act for injuries not incident to his service. The court there left open the question whether the United States could be held liable for injuries incident to service. The ***Brooks*** holding was followed in the post-*Feres* case of *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), holding that the United States may be liable under the FTCA for injuries incurred by a serviceman *after* his discharge because of the malpractice of the Veterans Administration Hospital.

Plaintiffs ask this Court to distinguish *Feres* on two grounds. First, they argue that *Feres* applies only to claims against the United States made pursuant to the Federal Tort Claims Act, and not to claims made against individual officers of the United States. Second, they argue that *Feres* applies only to negligence and not to intentional acts which deprive others of their constitutional rights. We find that the present state of the law does not permit us to uphold this claim.

The Court of Appeals for the Third Circuit has held that *Feres* cannot be avoided by bringing suit against individuals rather than against the United States. In *Bailey v. DeQuevedo*, 375 F.2d 72 (3rd Cir.), *cert. denied*, 389 U.S. 923, 88 S.Ct. 247, 19 L.Ed.2d 274 (1967), plaintiff alleged that while on active duty and confined in an Army hospital, he was the victim of an Army surgeon's malpractice. The court held that *Feres* precluded the suit:

> Although Feres . . . involved the construction of the Tort Claims Act, the Court's decision did not turn on the language of the Act itself but on "[t]he peculiar and special relationship of the soldier to

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[4] While *Feres* itself did not rest on policy considerations, subsequent cases have discerned a policy basis for that decision. *See, e. g., United States v. Brown, supra*, at 112, 75 S.Ct. at 143, noting "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . "

> his superiors, the effects of the maintenance of such suits on discipline, and the extreme results which might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty * * * " *United States v. Brown*, 348 U.S. 110, 112 [75 S.Ct. 141, 143, 99 L.Ed. 139] . . (1954).

375 F.2d at 74. Other circuits have similarly held under *Feres* that a plaintiff injured while on active duty may not bring suit against individual employees of the United States. *See, e. g., Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975); *Tirrill v. McNamara*, 451 F.2d 579 (9th Cir. 1971); *United States v. Lee,* 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969); *Bailey v. VanBuskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948, 86 S.Ct. 1205, 16 L.Ed.2d 210 (1966); *Misko v. United States*, 453 F.Supp. 513 (D.D.C.1978), *appeal pending*, 193 U.S. App. D.C. 217, 593 F.2d 1371; *Pisciotta v. Fernando*, 428 F.Supp. 685 (S.D. N.Y. 1977).

Every court that has considered plaintiff's second contention—that *Feres* does not apply to intentional acts—has rejected it. Recently, in *Misko v. United States, supra*, suit was brought under the Fifth Amendment against individual Army officers who allegedly confined the plaintiff, then on active duty in the National Guard, in Walter Reed Hospital, where they administered drugs against his will. The court held that *Feres* applied despite "the characterization of the malpractice claim in constitutional terms . . . " It noted that "[a]ny other result would mean that the *Feres*-based immunity of armed forces medical officers could be abrogated through an exercise in artful pleading." 453 F.Supp. at 515. *See also, Lange v. Black*, Civ. No. 78-518-E (S.D.Calif. 1979); *Citizens National Bank of Waukegan v. United States*, No. 77 C 1974 (E.D.Ill. 1978), *appeal pending*, 594 F.2d 1154, No. 78

1550 (7th Cir.) (noting that "litigation over intentional torts would disrupt discipline just as much as negligence actions"); *Dolliver v. United States*, Civ. No. 77-Z-659 (D. Col. 1977). *Cf., Rotko v. Abrams*, 338 F.Supp. 46 (D.Conn. 1971), *aff'd per curiam*, 455 F.2d 992 (2nd Cir. 1972) (*Feres* bars suit to recover for wanton injuries incurred in Viet Nam).

This Court is forced to agree that *Feres* and its offspring require dismissal of the individual defendants. To the extent that *Feres* is predicated upon the need for maintaining military discipline and avoiding judicial review of military orders, that consideration apparently applies with equal force to the negligence, intentional torts and unconstitutional actions of military officers. It is unfortunate that the law prevents this Court from limiting *Feres* to orders made in the heat of battle.

This unjust application of the *Feres* rule is perhaps best summed up in a colloquy between this Court and the government at oral argument:

> The Court: [A]s I read the law, it doesn't matter if they stood up there and said, "one, two, three, left, right, left," and marched them over a cliff . . . You'd be protected under *Feres* . . . ?
>
> Mr. Landman: Yes, your Honor.
>
> (Tr. 3/7/79 at 3).

The motion to dismiss the individual defendants will be granted.

Certificate of Service.

STEVEN J. PHILLIPS, an attorney for Petitioner and a member of the Bar of this Court certifies that on January, 14 1982, three copies of the foregoing Petition for a Writ of Certiorari and attached Appendix were served by mail upon all parties required to be served as follows:

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Dated: January 14, 1982

STEVEN J. PHILLIPS.

Opposition

Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1346

In the Supreme Court of the United States

OCTOBER TERM, 1981

STANLEY JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a serviceman may seek damages from his superior officers for allegedly having caused him to be exposed to unreasonably high levels of radiation during a military exercise.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1346

STANLEY JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-85a) is reported at 663 F. 2d 1226. The opinion of the court of appeals panel (Pet. App. 1b-28b) is not reported. The opinion of the district court (Pet. App. 1c-6c) is reported at 468 F. Supp. 632.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981. The petition for a writ of certiorari was filed on January 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Stanley Jaffee, a former soldier, and his wife brought this suit in the United States District Court for the District of New Jersey. They named as defendants the United States and the individual respondents, who are present and former Army officers and Department of Defense and Atomic Energy Commission officials. Petitioners claimed that, while Stanley Jaffee was on active duty in the Army in 1953, respondents committed state law torts against him and violated his constitutional rights by ordering him, as part of a military exercise, to stand near an atmospheric nuclear weapons test in Nevada. Petitioners alleged that, as a result of this exposure to excessive radiation, Stanley Jaffee contracted cancer in 1977. Petitioners sought $13 million in punitive and compensatory damages.[1]

The district court held that the principle of *Feres* v. *United States*, 340 U.S. 135 (1950), which bars servicemen's suits for damages as a result of service-related injuries when they are brought against the United States under the Federal Tort Claims Act, also required the dismissal of petitioners' damages claims against the individual respondents. The court reasoned that the concern expressed in *Feres* for "military discipline and avoiding judicial review of military orders * * * applie[d] with equal force" to claims against individual officers and officials (Pet. App. 6c).

The en banc court of appeals, overturning a panel decision, affirmed by a 7-2 vote. The court stated that the reasons for the *Feres* rule provided "a *stronger* argument for not allowing * * * suits against the individuals who made the challenged decision" (Pet. App. 15a, 20a; emphasis in original). The principal basis of *Feres*, the court explained, was the " 'peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline' " (Pet. App. 11a, quoting *United States* v. *Brown*, 348 U.S. 110, 113 (1954)). But "[s]uits against individuals have a far greater potential for chilling responsible decision-making than those against the government" (Pet. App. 15a). Suits against individuals, at least as much as the suits barred by *Feres*, "would 'involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions' " (Pet. App. 12a, quoting *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). Such claims would therefore be likely to "inhibit the exercise of military discretion" (Pet. App. 12a).

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[1] Petitioners' claim for damages against the United States under the Federal Tort Claims Act was dismissed by the district court at an earlier stage of this proceeding, and the court of appeals affirmed. *Jaffee* v. *United States*, 592 F. 2d 712, 715-719 (3d Cir.), cert. denied, 441 U.S. 961 (1979). See Pet. App. 6a-7a. Petitioners also sought an injunction warning all those allegedly exposed to radiation at the exercise to seek medical treatment. The district court initially held that this claim was barred by sovereign immunity, but the court of appeals reversed. 592 F. 2d at 715-720.

A second reason for the *Feres* principle, the court of appeals said, was that under the Veterans' Benefits Act of 1958, 38 U.S.C. 101 *et seq.*, a serviceman "is assured of a swift, 'simple, certain, and uniform compensation' for injuries occurring during his service, regardless of fault" (Pet. App. 12a-13a, quoting *Feres* v. *United States, supra*, 340 U.S. at 144). This alternative remedy—which, the court of appeals noted (Pet. App. 21a), this Court has described as "exclusive" (*Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 (1980))—constituted a fully adequate remedy for petitioners' injuries even if their damages suit against the individual respondents were not allowed.

The court of appeals rejected (Pet. App. 15a-18a) the suggestion that petitioners' claim should be allowed because, unlike the complaint in *Feres*, it alleged intentional violations. The court explained (*id.* at 17a):

> Litigation over intentional torts would appear to disrupt military discipline and undermine military decision-making as much as tort suits for negligence. * * * Indeed, the type of military exercise that gives rise to a claim of intentional torts, as in this case, is often more

> dependent on the exercise of discretionary military judgments than the adequacy of housing or medical care that was involved in *Feres.*
>
> The question of whether a[n] * * * act is taken intentionally, moreover, frequently turns on subtle issues of fact and intent that are difficult to fathom in the context of military exercises.

The court also ruled that petitioners' state law claims were barred, noting that another of the bases of the *Feres* doctrine was that Congress could not have intended to subject military decisions to scrutiny under varying state laws (Pet. App. 26a). Moreover, "[s]uits founded on state law have the same potential for undermining military discipline as federal tort claims" (*id.* at 25a).[2]

ARGUMENT

The court of appeals, reaching a conclusion consistent with that of every other court that has addressed this issue (see pages 9-11, *infra*), correctly held that petitioners have no claim for damages against Stanley Jaffee's superior officers for service-related injuries. This holding follows directly, if not a fortiori, from this Court's decision in *Feres.*

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[2] Judge Adams, concurring separately in the court's dismissal of the federal claims (Pet. App. 30a-43a), convassed the structure and legislative history of veterans' benefits programs and concluded that Congress intended them to be a fully adequate alternative remedy that "defeat[s] what, at least until recently, has been regarded as an extraordinary remedy—the implication of a cause of action for damages directly under the Constitution" (*id.* at 41a). Judge Adams concluded, however, that this alternative remedy did not bar the state law claims, and he dissented from their dismissal (*ibid.*). Judges Hunter and Aldisert joined the majority opinion, noting only that their views rested entirely on independent legal analysis and not on an extrapolation from the decisions of this Court (*id.* at 29a). Judges Gibbons and Sloviter dissented (*id.* at 44a-85a).

1. "It is clear that the basis of *Feres* was the Court's concern with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 676 (Marshall J., dissenting), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). These disruptive effects on military discipline, unquestionably substantial in the context of suits against the government, are vastly greater when superior officers are brought into court as defendants and threatened with massive personal liability. This Court has frequently stated that the threat of personal liability has a greater impact on officials' behavior than the possibility that the government will be held liable (see, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14, 21 (1980); *Owen* v. *City of Independence*, 445 U.S. 622, 653 n.37, 655-656 (1980)); it follows that the "effect of [petitioners' damages] action upon military discipline" (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673), if such an action were allowed to proceed, would be more severe than the effect of the suits that *Feres* barred precisely because they endangered military discipline.[3]

Petitioners suggest (*e.g.*, Pet. 4) that the principle announced in *Feres* does not apply to their claims because they alleged intentional wrongs, not negligence. *Feres* did not consider intentional wrongs, because when it was decided the Federal Tort Claims Act specifically did not waive sovereign immunity for intentional torts. See 28 U.S.C. (1970 ed.) 2680(h). But as the court of appeals pointed out, suits for intentional wrongs are even more likely to disrupt the internal operations of the military.[4] The plaintiffs in *Feres*, for example, asserted that Army doctors engaged in medical malpractice (apparently not under combat conditions) and that the military was negligent in quartering troops in barracks with a defective heating plant. 340 U.S. at 136-137. These actions have close civilian counterparts and are far less distincitvely military than respondents' alleged judgments about the risks to which soldiers were to be subjected during a military exercise; reevaluating the decisions at issue in *Feres* would have been far less disruptive of discipline than "second-guessing [the] military orders" (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673) allegedly issued or authorized by respondents. Indeed, perhaps the most distinctive aspect of military life is precisely that superior officers often must decide—not only in combat, but in training and other exercises as well—*intentionally* to expose servicemen to grave risks. Such decisions are "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)), and intentional military decisions that may endanger servicemen require, if anything, more protection from the chilling effect of potential liability than allegedly negligent acts. Finally, although we do not intend to suggest that petitioners' suit was brought in bad faith, the Court has noted that allowing damages actions for intentional wrongs might "especially tempt[]" those subject to federal authority to bring a suit for purposes of harassment or retribution. See *United States* v. *Muniz, supra*, 374 U.S. at 163.

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[3] Congress has recently reaffirmed the soundness of the *Feres* principle. See H.R. Rep. No. 97-384 (Pt. 1), 97th Cong., 1st Sess. 5 (1981).

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[4] Petitioners are incorrect in their assertion (Pet. 11-12) that *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), on writ of error after a new trial, *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 389 (1851), is to the contrary. That case involved a claim alleging a common law tort. See 48 U.S. (7 How.) at 89. Therefore, it simply did not present the question at issue here—whether a damages remedy should be created directly under the Constitution (see *Davis* v. *Passman*, 442 U.S. 228, 239-240 n.18, 241-248 (1979)). In addition, the plaintiff in *Dinsman* alleged that he was no longer a member of the armed forces when his commanding officer intentionally wronged him (see 53 U.S. (12 How.) at 402), an allegation that may, in certain circumstances, permit civilian courts to intervene in military affairs. Compare *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975) with *Toth* v. *Quarles*, 350 U.S. 11 (1950); compare *Feres* v. *United States, supra*, with *United States* v. *Brown, supra*. Moreover, the plaintiff in *Dinsman* alleged that a single officer beat him and falsely imprisoned him, a claim much more akin to a traditional tort action; petitioners, by contrast, assert that a military exercise—allegedly decided upon by a variety of military and civilian officials—violated the rights of all those soldiers engaged in it. Finally, *Dinsman* was decided before the era of mass standing armies and the development of large-scale veterans' benefits programs, the existence of which is a basis of the *Feres* doctrine. See 340 U.S. at 145.

Petitioners also cannot escape the limitations implicit in *Feres* by presenting their claim as an allegation of a constitutional violation instead of a tort. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and subsequent cases, the Court made it clear that it will not find an implied damages remedy for a constitutional violation if there are " 'special factors counseling hesitation in the absence of affirmative action by Congress' " or if Congress has provided a substitute remedy that, in Congress's view, is equally effective. *Id*. at 396, quoted in *Carlson* v. *Green, supra*, 446 U.S. at 18-19; see *Davis* v. *Passman*, 442 U.S. 228, 245-247 (1979). *Feres* establishes that the "peculiar and special relationship of the soldier to his superior" (*United States* v. *Brown, supra*, 348 U.S. at 112) is a special factor counseling hesitation. In *Feres*, the Court ruled that the extraordinary needs of military discipline precluded recognition of a damages remedy despite several indications, which the Court acknowledged, that Congress intended to permit servicemen to recover from the United States. See 340 U.S. at 138-139. Here, military discipline is more directly implicated, and there are no comparable indications that Congress intended to permit damages actions.[5]

In addition, as the court of appeals pointed out, the Veterans' Benefits Act of 1958, 38 U.S.C. 101 *et seq.*, gives petitioners an alternative remedy—a means of receiving compensation, without proof of fault, in the amount Congress determined to be appropriate for their injuries. See *Feres* v. *United States, supra*, 340 U.S. at 145. See also *Purtill* v. *Harris*, 658 F. 2d 134, 137-138 (3d Cir. 1981), petition for cert. pending, No. 81-1010 (filed Nov. 23, 1981); *Bush* v. *Lucas*, 647 F. 2d 573 (5th Cir. 1981), petition for cert. pending, No. 81-469 (filed Sept. 4, 1981); *Bishop* v. *Tice*, 622 F. 2d 349, 357 (8th Cir. 1980). Veterans' benefits do, of course, differ in certain respects from the damages petitioners seek; they do not include punitive damages, and they do not have the same deterrent effect. See *Carlson* v. *Green, supra*, 446 U.S. at 21-22. But these differences do not suggest that veterans' benefits are an inadequate remedy; rather, they are precisely the aspects of a damages remedy that render it inappropriate in a military context.

Military officers who act unlawfully are subject to administrative and, if warranted, criminal sanctions. To permit a damages recovery because of its deterrent and punitive effects would be to give courts and juries (see *Carlson* v. *Green, supra*, 446 U.S. at 22-23), acting at the behest of servicemen, a major role in regulating military discipline; they would be able to determine the circumstances under which superior officers will be subject to sanctions for their behavior toward those they command, as well as the nature and amount of the sanctions. Such judgments about punishing military officers for acting improperly toward subordinates are principal examples of the " 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force' " about which this Court has said, " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence' " (*Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 7, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). Veterans' benefits should, therefore, be regarded as an adequate substitute for a damages action implied directly under the Constitution.[6]

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[5] Even where direct restrictions on constitutional rights are involved, this Court has declined to take steps that risked interfering in military discipline: "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline." *Brown* v. *Glines*, 444 U.S. 348, 357 (1980). See also *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Parker* v. *Levy*, 417 U.S. 733 (1974). Here the Court deals not with a constitutional right but only with the appropriate remedy. See *Schlesinger* v. *Councilman, supra*, 420 U.S. at 757-760. Consequently, there is even less reason to risk an improvident intrusion into military affairs.

2. Petitioners incorrectly assert (Pet. 4, 12-13) that the court of appeals' decision conflicts with *Wallace* v. *Chappell*, 661 F. 2d 729 (9th Cir. 1981). *Wallace* was a suit for damages by black servicemen against their superior officers. The plaintiffs claimed that they had been discriminated against in duty assignments, performance evaluations, and discipline because of their race. They based their claims directly on the Constitution and on 42 U.S.C. 1985(3). 661 F. 2d at 730. The Ninth Circuit stated that the issue was

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[6] The court of appeals' rejection of petitioners' state law claims plainly does not merit review by this Court. This Court has repeatedly made it clear that federal law is to govern the " 'distinctively federal' " relationship between a serviceman and those who command him. " '[T]he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.' " *Feres* v. *United States*, *supra*, 340 U.S. at 143-144, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306 (1947). In addition, under *Barr* v. *Matteo*, 360 U.S. 564 (1959), the individual respondents are absolutely immune from liability for state tort claims. See *Butz* v. *Economou*, 438 U.S. 478, 495 (1978).

whether the challenged military decisions were "reviewable" (*id.* at 731). It ruled that no military decision was reviewable unless the plaintiff alleged a violation of "a 'recognized' constitutional right. * * * [T]he allegations must amount to more than a traditional state law claim" (*id.* at 734). If a claim did allege the violation of a recognized constitutional right, the Ninth Circuit held that it would consider the four factors specified in *Mindes* v. *Seaman*, 453 F. 2d 197 (5th Cir. 1971), to determine whether the challenged military decision was reviewable. Those factors are (661 F. 2d at 732-733; emphasis omitted): "(1) The nature and strength of the plaintiff's claim. * * * (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions. * * * (4) The extent to which military discretion or expertise is involved." The Ninth Circuit then remanded the case for a determination of whether the military decisons at issue were reviewable, stating that "[t]he district court must exercise its discretion in balancing these factors, and we express no view as to what the outcome should be" (*id.* at 738).

While we disagree with the court of appeals' analysis in *Wallace*, it is plain that that decision does not indicate that the Ninth Circuit would sustain petitioners' claims. It is unlikely that the Ninth Circuit would consider petitioners to be asserting a "recognized" constitutional right, or one of sufficient importance (see 661 F. 2d at 733) to warrant an intrusion into military concerns. Several of the factors identified in *Wallace*—"the extent to which military * * * expertise is involved," the "extent of interference with military functions," and the availability of a monetary remedy under the Veterans' Benefits Act, for example—suggest that the Ninth Circuit would not consider petitioners' claims "reviewable." See also *Lewis* v. *United States*, 663 F. 2d 889 (9th Cir. 1981) (holding that *Feres* bars suits alleging intentional torts); *Broudy* v. *United States*, 661 F. 2d 125 (9th

Cir. 1981) (rejecting claims similar to petitioners' brought under the Federal Tort Claims Act). Consequently, there is no basis for asserting a conflict between *Wallace* and the decision of the court of appeals in this case. Notably, so far as we are aware, every other lower court decision involving a damagers action brought by a serviceman against his superior officers has been decided in a fashion consistent with the decision below, agreeing that the principles announced in *Feres* preclude such a suit. See, *e.g.*, *Calhoun* v. *United States*, 604 F. 2d 647 (9th Cir. 1979), aff'g and adopting 475 F. Supp. 1, 4 (S.D. Cal. 1977), cert. denied, 444 U.S. 1078 (1980); *Rotko* v. *Abrams*, 455 F. 2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46, 48 (D. Conn. 1971); *Bailey* v. *Van Buskirk*, 345 F. 2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966); *Sigler* v. *LeVan*, 485 F. Supp. 185, 189-192 (D. Md. 1980), appeal dismissed, Nos. 80-1160 & 80-1202 (4th Cir. Apr. 29, 1980); *Schmid* v. *Rumsfeld*, 481 F. Supp. 19 (N.D. Cal. 1979); *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515-516 (D.D.C. 1978), aff'd, 593 F. 2d 1371 (D.C. Cir. 1979); *Birdwell* v. *Schlesinger*, 403 F. Supp. 710, 718 (D. Colo. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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